2-7-2018

State v. Wilson Appellant's Brief Dckt. 45193

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45193**
Plaintiff-Respondent,	)	
	)	**CANYON COUNTY NO. CR-2016-14841**
v.	)	
	)	
RICHARD ALAN WILSON,	)	**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
I.S.B. #6555

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

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

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

After being charged with two counts of aiding and abetting trafficking in methamphetamine, Richard Wilson exercised his constitutional right to a jury trial. He was found guilty as charged, and received an aggregate sentence of ten years, with three years fixed.

On appeal, in what appears to be an issue of first impression for the appellate courts in Idaho, he asserts that the evidence presented at trial was insufficient to support his conviction of aiding and abetting trafficking by represented amount (Count II), because the State failed to establish that Mr. Wilson knew that his accomplice was representing the controlled substance to be "one ounce" or more. Additionally, the evidence presented at trial was insufficient to support Mr. Wilson's conviction on Count II where the State failed to establish that his alleged accomplice affirmatively represented she was selling one ounce of methamphetamine. Finally, the evidence presented at trial was insufficient to support Mr. Wilson's convictions as to both counts where the State failed to establish that Mr. Wilson knew the substance the alleged accomplice sold on the two occasions was methamphetamine.

Statement of the Facts and Course of Proceedings

At approximately six o'clock in the evening on April 7, 2016, law enforcement made a controlled drug buy from Regina Jones. (2/28/17 Trial Tr., p.178, Ls.2-24; p.179, L.24 – p.180, L.1.) Richard Wilson was there with Ms. Jones at a Target store parking lot, and was standing outside a white SUV with the hood up. (2/28/17 Trial Tr., p.179, L.21 – p.182, L.4.) Ms. Jones got out of the SUV and into the undercover officer's car to deliver the methamphetamine. (2/28/17 Trial Tr., p.182, Ls.14-15.) Mr. Wilson waited outside by the SUV—he was not in the car during the transaction, and he did not speak to the officer who obtained the

methamphetamine from Ms. Jones. (2/28/17 Trial Tr., p.190, L.23 – p.191, L.3; 3/1/17 Trial Tr., p.80, L.23 – p.81, L.9; p.95, L.24 – p.96, L.9.) The undercover officer purchased nearly two ounces of methamphetamine from Ms. Jones. (2/28/17 Trial Tr., p.182, Ls.18-20; 3/1/17 Trial Tr., p.21, Ls.13-25.) The package obtained on April 7, 2016 from Ms. Jones weighed 55.65 grams. (3/1/17 Trial Tr., p.21, Ls.13-25.)

Twenty days later, on April 27, 2016, the same officer purchased close to an ounce of additional methamphetamine from Ms. Jones. (2/28/17 Trial Tr., p.211, L.15 – p.212, L.25.) This time the parties met in the McDonald's parking lot, and Mr. Wilson drove Ms. Jones there in a blue Nissan. (3/1/17 Trial Tr., p.94, Ls.1-21.) Again, he put the hood up on the vehicle, and Ms. Jones got into the officer's car to exchange the methamphetamine for money. (2/28/17 Trial Tr., p.215, L.7 - p.216, L.5.) Again, Mr. Wilson waited outside the car during the transaction. (3/1/17 Trial Tr., p.94, Ls.10-15; p.96, Ls.10-20.) After Mr. Wilson and Ms. Jones drove away from the second transaction, officers stopped the vehicle and $600 of the marked bills were found on Mr. Wilson. (3/1/17 Trial Tr., p.100, L.7 – p.104, L.22; p.127, L.17 – p.128, L.22.) An additional package of methamphetamine was located on Ms. Jones' person when she was searched. (3/1/17 Trial Tr., p.108, L.4 – p.109, L.12.)

The package the undercover officer purchased from Ms. Jones during the second controlled buy contained a substance that tested positive for methamphetamine, and weighed 25.91 grams. (3/1/17 Trial Tr., p.32, Ls.1-17.)

Mr. Wilson was charged by Indictment with two counts of aiding and abetting trafficking in methamphetamine. (R., pp.7-8.)

A two-day jury trial was held. (*See* 2/28/17 Trial Tr., 3/1/17 Trial Tr.)

At trial, Detective Phillips testified that he was contacted by Ms. Jones who offered to sell him two ounces of methamphetamine. (2/28/17 Trial Tr., p.179, Ls.4-18.) The second time he asked her for methamphetamine, he asked her for one ounce. (2/28/17 Trial Tr., p.212, Ls.8-10.)

Sergeant Shane Huston, who watched both transactions from several cars away, testified that the male that arrived with Ms. Jones on April 7, 2016 was not in the vehicle where Detective Phillips was doing the drug deal with Ms. Jones, and his voice was not heard over the wire. (3/1/17 Trial Tr., p.90, Ls.1-7; p.95, L.24 – p.96, L.9.) Sergeant Huston also testified that Mr. Wilson was not in the vehicle with Detective Phillips and Ms. Jones when the drug deal was happening on April 27, 2016, and he did not hear another male's voice over the wire during that deal. (3/1/17 Trial Tr., p.96, Ls.10-20.)

Corinna Owsley, a forensic scientist employed by the Idaho State Police Lab, testified that the two plastic bags she analyzed contained methamphetamine. (3/1/17 Trial Tr., p.13, Ls.1-9; p.17, L.19 – p.24, L.8.) Ms. Owsley testified that the first set of two bags containing methamphetamine weighed 27.76 grams and 27.89 grams. (3/1/17 Trial Tr., p.21, Ls.13-25.) She testified that the bag obtained from Ms. Jones on April 27, 2016 contained methamphetamine which weighed 25.91 grams. (3/1/17 Trial Tr., p.32, Ls.1-17.) Mr. Wilson did not testify at his trial; however, his police interview was admitted into evidence and played to the jury. (3/1/17 Trial Tr., p.149, Ls.21-24; State's Exhibit No. 5.) Ms. Jones did not testify at Mr. Wilson's trial.

At the close of the State's case, Mr. Wilson made a motion for acquittal as to Count II, which charged Mr. Wilson with aiding and abetting trafficking an amount of methamphetamine represented to be "one ounce." (3/1/17 Trial Tr., p.145, Ls.8-20.) Mr. Wilson argued that the

evidence was insufficient to prove an element of the crime—that the defendant represented the amount of methamphetamine to be an ounce or more where the evidence in front of the Court was that the amount of controlled substance was less than one ounce. (3/1/17 Trial Tr., p.145, Ls.8-20.) The district court denied the motion. (3/1/17 Trial Tr., p.147, L.4 – p.148, L.20.)

During its deliberations, the jury had a question: "In Instruction # 14 and # 15, item 5. Either: (a). . . (b): is the standard that simply 28 grams or 1 oz. represented was delivered, or, does it mean Richard Wilson had to know it was 28 oz. [sic] represented as a(n) oz. or more."[1] (Augmentation, p.59.) The district court proposed to the parties that it would answer the jury by writing, "What the defendant had to know is fully set forth in Jury Instruction #14 and #15." (3/1/17 Trial Tr., p.210, Ls.18-22.) Defense counsel objected and requested the answer to read, "The applicable law is set forth in instruction 14 and 15." (3/1/17 Trial Tr., p.211, Ls.1-4.) The district court overruled the objection and answered the jury as follows, "What the defendant had to know is fully set forth in Jury Instruction #14 and #15." (3/1/17 Trial Tr., p.211, Ls.11-12; Augmentation, p.60.)

The jury found Mr. Wilson guilty as charged. (R., pp.139-140.)

The district court then sentenced Mr. Wilson to ten years, with three years fixed, on each

[1] The jury's question was about the trafficking by represented amount element. Jury Instructions Nos. 14 and 15 were the elements of trafficking, and section 5 provided:

> 5. Either:
>
> (a) the quantity delivered was at least twenty-eight (28) grams of methamphetamine or any mixture or substance with a detectable amount of methamphetamine,
>
> Or
>
> (b) the quantity delivered was represented to be one ounce or more of methamphetamine.

(Augmentation, pp.38-39 (JI Nos. 14, 15).)

count, to be served concurrently. (5/1/17 Tr., p.32, L.13 – p.33, L.6; R., pp.191-192.) The sentences were concurrent with each count and concurrent with Mr. Wilson's sentences in any other cases. (5/1/17 Tr., p.32, L.5 – p.33, L.6; R., p.156.) A Judgment of Conviction was entered on May 4, 2017. (R., pp.155-156.) On June 13, 2017, Mr. Wilson filed a Notice of Appeal. (R., pp.157-161.)

ISSUE

Was there sufficient evidence to support Mr. Wilson's convictions of two counts of aiding and abetting trafficking in methamphetamine?

ARGUMENT

There Was Insufficient Evidence To Convict Mr. Wilson Of Two Counts Of Aiding And Abetting Trafficking In Methamphetamine

A. Introduction

As a matter of first impression in Idaho, the issue presented here is whether, in order for the jury to convict Mr. Wilson of aiding and abetting trafficking by represented amount, the State was required to establish that Mr. Wilson knew that Ms. Jones was representing the controlled substance to be "one ounce" or more. He contends that, where the amount of methamphetamine Ms. Jones sold to the undercover officer was less than 28 grams, in order to prove Mr. Wilson aided and abetted trafficking, the State was required to establish that Mr. Wilson knew Ms. Jones represented the quantity she sold as "one ounce."

A person may not be convicted of a crime absent sufficient evidence to support a finding, by a reasonable trier of fact, that the State proved each element of the crime beyond a reasonable doubt. Because Mr. Wilson was charged with aiding and abetting trafficking by represented amount, and the represented amount is an element of the offense, Mr. Wilson's conviction required his knowledge that Ms. Jones was selling the methamphetamine as a represented ounce. If he did not have such knowledge, he could not be guilty of the offense, as aiding and abetting requires a community of purpose—for him to have the same criminal intent as Ms. Jones. Where her conviction required a representation in order to establish an element, the amount, as an aider and abettor interchangeable with the principal, Mr. Wilson must have had knowledge of her representation(s). Further, as another basis for vacating Mr. Wilson's conviction on Count II, the State failed to present substantial evidence that Ms. Jones represented the amount sold as "one ounce."

Mr. Wilson also contends that the evidence was insufficient to support his convictions of both Counts I and II where the State failed to prove that Mr. Wilson knew the substance sold was methamphetamine.

Because, as to Count II, the State presented insufficient evidence to prove that Mr. Wilson knew the quantity of methamphetamine Ms. Jones represented to the undercover officer and where Ms. Jones never represented a quantity to the undercover officer, and because, as to both counts, the State failed to establish that Mr. Wilson knew the substance Ms. Jones was purportedly selling was methamphetamine, this Court must vacate Mr. Wilson's convictions of both counts.

B. There Was Insufficient Evidence To Convict Mr. Wilson Of Two Counts Of Aiding And Abetting Trafficking In Methamphetamine

When reviewing the sufficiency of the evidence where a judgment of conviction has been entered upon a jury verdict, the evidence is sufficient to support the jury's guilty verdict if there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera–Brito,* 131 Idaho 383, 385 (Ct. App. 1998).

The appellate court will not substitute its view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *State v. Decker,* 108 Idaho 683, 684 (Ct. App. 1985). The evidence is considered in the light most favorable to the prosecution. *Herrera–Brito,* 131 Idaho at 385.

1. The State Failed To Present Substantial Evidence That Mr. Wilson Aided And Abetted In Trafficking By Represented Amount, As Alleged In Count II

The methamphetamine trafficking provision of the trafficking statute under which Mr. Wilson was charged provides that:

> Any person who knowingly delivers, or brings into this state, or who is knowingly in actual or constructive possession of, twenty-eight (28) grams or more of methamphetamine or amphetamine or of any mixture or substance containing a detectable amount of methamphetamine or amphetamine is guilty of a felony, which felony shall be known as "trafficking in methamphetamine or amphetamine."

I.C. § 37-2732B(a)(4). The trafficking statute also states that, "For the purposes of subsections (a) and (b) of this section 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(c).

The State relied upon subsection (c) in prosecuting Mr. Wilson for trafficking, alleging Ms. Jones represented the weight of the methamphetamine was one ounce (28.35 grams), although the amount she delivered was less than twenty-eight grams (25.91 grams). (R., pp.7-8.)

At trial, the jury was instructed as to the elements of Count II:

> In order for the defendant to be guilty of Aiding and Abetting Trafficking of methamphetamine as charged in Count I, the state must prove:
>
> 1. On or about April 27, 2016
>
> 2. in the state of Idaho
>
> 3. the defendant aided and abetted Regina L. Jones in the delivery of methamphetamine,
>
> 4. the defendant knew it was methamphetamine, and
>
> 5. Either:
>
> (a) the quantity delivered was at least twenty-eight (28) grams of methamphetamine or any mixture or substance with a detectable amount of methamphetamine,
>
> Or
>
> (b) the quantity delivered was represented to be one ounce or more of methamphetamine.

(Augmentation, p.39 (JI No. 15).) (reasonable doubt paragraph omitted).

The jury was also instructed on the representation theory:

> Under Idaho law, 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.

(Augmentation, p.41 (JI No. 17).) Here, the amount sold on April 27, 2017, as charged in Count II, was only 25.91 grams, and not one ounce (28.35 grams). (3/1/17 Tr., p.32, Ls.1-17.) Therefore, the State proceeded to try Mr. Wilson on the representation theory as to Count II.

a. The State Failed To Present Substantial Evidence That Mr. Wilson Knew The Quantity Of Methamphetamine Ms. Jones Represented She Was Selling Or Delivering

In order to convict Ms. Jones of trafficking, the State would be required to prove that Ms. Jones represented to Detective Phillips that she was selling him "one ounce" of methamphetamine. Mr. Wilson asserts that, in order to convict him of aiding and abetting Ms. Jones' trafficking by represented amount, the State was required to prove that he knew Ms. Jones was selling an amount represented to be one ounce. This it did not do.

At trial, the State's witness testified that Mr. Wilson was not privy to any in-person conversations between Ms. Jones and Detective Phillips. (3/1/17 Trial Tr., p.95, L.24 – p.96, L.9 (Sergeant Huston testified that the male that arrived with Ms. Jones on April 7, 2016 was not in the vehicle where Detective Phillips was doing the drug deal with Ms. Jones, and his voice was not heard over the wire); p.96, Ls.10-20 (Sergeant Huston testifying that Mr. Wilson was not in the vehicle with Detective Phillips and Ms. Jones when the drug deal was happening on April 27, 2016, and he did not hear another male's voice over the wire during that deal).) The State did not introduce any evidence that Mr. Wilson ever communicated with Detective Phillips. When interviewed, Mr. Wilson made no statements regarding the amount or even the type of drug Ms. Jones was selling. (*See* State's Exhibit No. 5.)

At the close of the State's case, Mr. Wilson made an I.C.R. 29 motion for acquittal on both counts. (3/1/17 Trial Tr., p.145, L.8 – p.146, L.1.) As to Count II, which charged Mr. Wilson with trafficking by representation, Mr. Wilson argued that the evidence was insufficient to prove an element of the crime—that the defendant represented the amount of methamphetamine to be an ounce or more where the evidence in front of the Court was that the amount of controlled substance was less than one ounce. (3/1/17 Trial Tr., p.145, Ls.8-20.) In denying the motion, the district court explained:

> I did rule as a matter of first impression that with respect to a case like this where there are two people involved, one is doing the delivering and one is aiding and abetting, that the representations of the person doing the delivering as to the quantity are attributable to the aider and abetter.
>
> And I believe that's consistent with the situation where you have a robbery with a getaway driver and a person ends up being killed. So I don't see much difference between that and the aider and abetter. The witness is stuck with the representations and they are attributable to him.

(3/1/17 Trial Tr., p.147, Ls.4-16.)

i. <u>The State Failed To Present Substantial Evidence That Mr. Wilson Shared The Criminal Intent Of Ms. Jones—That His Acts Had A "Community Of Purpose" And That He "Shared The Criminal Intent Of The Principal" To Traffic Where It Failed To Prove That Mr. Wilson Knew The Amount Of Methamphetamine Ms. Jones Represented</u>

The jury was instructed on aiding and abetting as follows:

> All persons who participate in a crime either before or during its commission, by intentionally aiding, abetting, facilitating, encouraging, and/or assisting another to commit the crime with intent to promote or assist in its commission are guilty of the crime. All such participants are considered principals in the commission of the crime. The participation of each defendant in the crime must be proved beyond a reasonable doubt.

(Augmentation, p.42 (JI No. 18).) "To be an aider and abettor one must share the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking."

State v. Scroggins, 110 Idaho 380, 716 P.2d 1152 (1985) (quoting *State v. Duran*, 526 P.2d 188, 189 (N.M. Ct. App. 1974)). The aider and abettor must have both the requisite intent and must have acted in some manner to bring about the intended result. *State v. Mitchell*, 146 Idaho 378, 383 (Ct. App. 2008) (holding sufficient evidence presented for jury to infer defendant knowingly provided weapon with intent that it be used against someone during the robbery, thus, defendant had requisite intent of a principal to commit aggravated battery).

While more than one person can commit acts constituting a single crime, the common law made distinctions in classifying the parties to a crime depending upon the role they played. 2 W. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 13.1 at 326-28. (2d ed. 2003). Over time, these distinctions became problematic and the Idaho Legislature enacted Idaho Code §§ 18-204, 19-1430, and 19-1431 to alleviate the confusion and complications caused by the distinctions. Idaho thusly eliminated the distinctions between a principal in the first degree and an "aider and abettor" in liability and in potential punishment. Idaho Code § 18-204 provides:

> All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, or who, by fraud, contrivance, or force, occasion the intoxication of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command or coercion, compel another to commit any crime, are principals in any crime so committed.

I.C. § 18-204. Idaho Code § 19-1430 provides:

> The distinction between an accessory before the fact and a principal and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal.

I.C. § 19-1430. Finally, Idaho Code § 19-1431 reads, "An accessory to the commission of a felony may be indicted, tried, and punished, though the principal may be neither indicted nor tried." I.C. § 19-1431.

ii. Idaho Courts Have Held There Is No Distinction Between Aiders And Abettors And Principals, And The State's Burden Of Proof Is The Same

In 2008, the Idaho Supreme Court the Court reasoned, "[t]ogether, I.C. § 18-204 and I.C. § 19-1430 show a legislative intent to consider defendants as principals whether they directly committed the crime or aided and abetted in the commission of the crime." *State v. Johnson*, 145 Idaho 970, 974 (2008). In *Johnson*, the Court held, "In Idaho there is no distinction between principals and aiders and abettors, and it is unnecessary [that] the charging document allege any facts other than what is necessary to convict a principal." *Johnson*, 145 Idaho at 976.

On numerous occasions the Idaho Supreme Court has affirmed convictions on an aiding and abetting theory even when the State failed to expressly charge the defendant as an accomplice. *See State v. Adamcik*, 152 Idaho 445, 474, 272 P.3d 417, 446 (2012) (holding Information charging defendant with killing the victim by purchasing knives and stabbing her, as set out in a jury instruction, was therefore sufficient to put him on notice that he could be found guilty as an accomplice in the murder); *Johnson*, 145 Idaho at 978 (holding that, "Because both principal and accomplice theories are just different means of proving the underlying charge—*e.g.*, murder—there are no additional elements the State must prove"); *State v. Ayers*, 70 Idaho 18, 25-26 (1949) (holding Information was sufficient to put Ayres on trial under either a principal or accomplice theory, even though it only charged him as a principal).

As the Idaho Supreme Court has oft held, aiders and abettors are interchangeable with principals—there are no additional elements the State must prove. *Adamcik*, 152 Idaho at 464. Conversely, Mr. Wilson could not have been convicted as a principal under the State's theory without making a representation regarding the amount of the methamphetamine, thus he was required to at least have knowledge of what the amount purported to be.

While there are no Idaho cases addressing the knowledge necessary to convict a defendant for aiding and abetting in trafficking by represented amount, a fairly recent United States Supreme Court decision, *Rosemond v. United States*, ___ U.S. ___, 134 S. Ct. 1240 (2014), is instructive. The federal aiding and abetting statute at issue in *Rosemond* was 18 U.S.C. § 2, which provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2. These provisions, like Idaho law, derives from (and simplifies) common law standards for accomplice liability. *Rosemond*, 134 S. Ct. at 1245.

In *Rosemond*, the Court addressed the question of the specific intent required to be convicted of aiding and abetting the use of a firearm in during a federal drug-trafficking offense under 18 U.S.C. §§ 2 and 924(c). The jury was instructed only on the defendant's active participation in the drug trafficking crime. *Id*. 134 S. Ct. at 1251. The Court reversed the conviction, holding that the jury should have also been instructed that the defendant must have known about the gun. *Id*. The Court held that the jury must find that the "defendant has chosen, with full knowledge, to participate in the illegal scheme." *Id.* at 1250. The Court held that, in order to convict the defendant under section 924(c), he must have had "advance knowledge" that

one of his comrades would use or carry a gun as part of the crime's commission, because "a state of mind extending to the entire crime" is required for conviction of the offense. 134 S. Ct. at 1245, 1248–49. The language of the federal aiding and abetting statute is similar to Idaho's, and a similar decision is warranted here—in order to be convicted of aiding and abetting trafficking in a certain represented amount, Mr. Wilson must have had advance knowledge of the amount.

Even co-conspirators must have knowledge of the quantity. In 2007, the Eighth Circuit decided a case involving the defendant's knowledge of the quantity of methamphetamine involved in a distribution conspiracy. *United States v. Rolon-Ramos*, 502 F.3d 750, 754–55 (8th Cir. 2007). In *Rolon-Ramos*, the indictment charged the defendant with conspiracy to distribute at least 500 grams of methamphetamine, and the jury convicted him of that count. 502 F.3d 750, 754–55. Two of the sections under which he was charged did not require any specific quantity for conviction; however, the third section required proof of a drug quantity. *Id.* at 754-755.

The Eighth Circuit reversed the defendant's conviction as to the drug quantity determination because the evidence did not support the conviction where the government failed to establish that actual methamphetamine amounts were ever discussed in the defendant's presence by the other co-conspirators. *Id.* It held that none of the inferences that could reasonably be drawn from the evidence established that the defendant was involved with, participated in, or could have reasonably foreseen a distribution conspiracy involving more than 500 grams of methamphetamine. 502 F.3d at 756; s*ee also United States v. Hayes*, 342 F.3d 385, 391-92 (5th Cir. 2003) (reversing defendant's conviction for conspiracy to distribute more than 50 grams of crack cocaine because evidence did not support that quantity, and remanding with instructions to resentence defendant for conspiracy to distribute more than 5 grams but less

than 50 grams of crack cocaine); *United States v. Gomez-Rosario,* 418 F.3d 90, 104 (1st Cir. 2005) (finding that, because no specific drug quantity needs to be proven for a jury to convict a defendant under 21 U.S.C. § 841(a), a defendant may be found guilty of the crime charged, but responsible for a lesser quantity of drugs than that specified in the indictment).

Because principal and accomplice theories are just different means of proving the underlying charge, such reasoning requires the aider and abettor to commit the same offense, with the same elements, as the principal. *Adamcik,* 152 Idaho at 464. An aider and abettor must manifest a sharing of the criminal intent of the perpetrator and have acted in some manner to bring about the intended result. *State v. Gonzalez,* 134 Idaho 907, 909 (Ct. App. 2000). As explained in *State v. Mitchell,* 146 Idaho 378, 384 (Ct. App. 2008), the aider and abettor must have the requisite intent required by statute as if he was the principal. If there truly is no distinction between principals and aiders and abettors, then the aider and abettor must at least know of the principal's representation in order to be convicted, because the principal certainly could not be convicted under subsection (c) without representing an amount.

Here, the evidence was insufficient to support a conviction under Count II where there could be no "community of purpose" absent Mr. Wilson's knowledge of the amount of substance Ms. Jones was selling; nor could Mr. Wilson have been convicted as an aider and abettor or a principal under (c) without evidence that he knew of the amount represented.

b. The Evidence Was Insufficient To Support Mr. Wilson's Conviction Where The Amount Of Methamphetamine Was Never Represented By The Seller

Mr. Wilson asserts that there is insufficient evidence in the record to support his conviction of Count II because there is no evidence in the record that demonstrates that

Ms. Jones affirmatively represented that she was selling Detective Phillips one ounce on April 27, 2016.

As analyzed in Section a, Idaho law provides two ways in which a person can be convicted of trafficking in methamphetamine: (1) based on the actual weight of the substance, or (2) based on the weight "as represented by the person selling or delivering it if the weight as represented is greater than the actual weight of the controlled substance." Idaho Code § 37-2732B(a)(4) (actual weight) and (c) (represented weight).

In this case, the State sought a conviction of Mr. Wilson for Count II based on the amount as represented by the person selling or delivering it. (Augmentation, p.39 (JI No. 15).) However, the evidence presented by the State was not sufficient to support a conviction on this basis, thus, Mr. Wilson respectfully requests that this Court vacate the judgment of conviction for Count II.

The evidence was insufficient to support a conviction based on represented weight in light of the State's failure to produce any evidence that Ms. Jones[2] told Detective Phillips she was providing him with an "ounce" or an equivalent term of weight used in the illegal drug trade. *See State v. Escobar*, 134 Idaho 387, 389 (Ct. App. 2000) (finding evidence sufficient to support conviction for trafficking based on represented weight where "the evidence presented to the jury[] show[ed] that Escobar represented the amount sold to be one ounce").

The evidence was insufficient to support the jury's verdict where there was no substantial evidence upon which the jury could have found the essential element of the weight of the substance beyond a reasonable doubt. The substance weighed 25.91 grams (3/1/17 Trial Tr., p.32, Ls.1-17), less than the 28 grams generally required by the trafficking statute. *See*

I.C. § 37-2732B(a)(4). Thus, to prove the essential element of the weight of the substance, the State had to show under § 37-2732B(c) that Ms. Jones represented that the weight was 28 grams or more.

Whether Ms. Jones "represented" the weight of the substance within the meaning of the trafficking statute is an issue of statutory interpretation. *Cf. State v. Escobar*, 134 Idaho 387, 389 (Ct. App. 2000).[3] The interpretation of a statute is a question of law, over which appellate courts exercise free review. *State v. Hart*, 135 Idaho 827, 829 (2001). The Idaho Supreme Court has outlined the following rules of statutory interpretation. "The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893 (2011) (internal quotation marks omitted). "If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written."[4] *Id.* (internal quotation marks omitted). "We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *Id.* (internal quotation marks omitted). "The asserted purpose for enacting the legislation cannot modify its plain meaning." *Id.* (internal quotation marks omitted). Appellate courts do not have authority to revise or void

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[2] As discussed in Section I, Mr. Wilson made no representations and there is no evidence he knew what Ms. Jones was selling or how much she was selling.

[3] In *Escobar*, the Idaho Court of Appeals interpreted I.C. § 37-2732B(c) as "mak[ing] no distinction between offenses that involve a completed delivery and those that do not." *Escobar*, 134 Idaho at 389. According to the Court, "under subsections [(a)(4)] and (c), a defendant may be convicted of trafficking in methamphetamine if the defendant represented the weight of the delivered substance to be twenty-eight grams or more, even if the actual weight was less." *Id.* The defendant in *Escobar* was charged under the methamphetamine trafficking provision of the trafficking statute before it was renumbered to I.C. § 37-2732B(a)(4). *Id.* at 388 n.1.

"an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written." *Id.* at 896. "If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial." *Id.* at 893 (internal quotation marks omitted).

Title 37 of the Idaho Code does not define "represented." *See* I.C. § 37-2701. This does not mean Section 37-2732B(c) is ambiguous, because the plain, usual, and ordinary meaning of "represented" may be gleaned from other sources. The most relevant definition of "representation" from *Black's Law Dictionary* provides that a "representation" is "[a] presentation of fact—either by words or by conduct—made to induce someone to act, esp. to enter into a contract; esp., the manifestation to another that a fact, including a state of mind, exists." *Black's Law Dictionary* (10th ed. 2014). The Merriam-Webster Online Dictionary's most relevant definition of "represent" provides that the term means "to describe as having a specified character or quality." Represent, *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/represent (last accessed on Feb. 4, 2018.)

Applying the plain, usual, and ordinary meaning of "represented" from the above sources shows that there was insufficient evidence on the weight element because Ms. Jones did not represent the weight of the substance. Even in the audio recordings of the controlled buys, the State presented no evidence that Ms. Jones represented the weight of the substance to Detective Phillips—there are no recorded statements attributed to Ms. Jones regarding the weight of the methamphetamine sold on April 27, 2016. (*See* State's Exhibit No. 9.) It was Detective Phillips' testimony that he "was supposed to be getting an ounce of Methamphetamine for $600" (2/28/17

[4] "A statute is ambiguous where the language is capable of more than one reasonable construction. An unambiguous statute would have only one reasonable interpretation." *Verska*, 151 Idaho at 896 (citation and internal quotation marks omitted).

Trial Tr., p.212, Ls.8-10); however, there were no statements made during the transaction from which the jury could infer that Ms. Jones was representing the methamphetamine to weigh an ounce.[5] (*See* State's Exhibit No. 9.) Even if Ms. Jones failed to disagree with Detective Phillips' request, or controvert his assumption that it was the amount he asked for, such acquiescence is not the affirmative representation that must be established under the statute. It is not Detective Phillips' representation of what amount he wanted to purchase—the plain language of the statute requires the person selling or delivering the substance to "represent" its quantity. I.C. § 37-2732B(c); Augmentation, p.41 (JI No. 17).) Ms. Jones never presented as fact, through her words or conduct, that the substance she gave Detective Phillips weighed an ounce (which equals 28.35 grams). Further, Ms. Jones' actions in going to the agreed-upon location with the substance did not represent the weight of the substance. At best, Ms. Jones' conduct represented that she had the substance in her possession, but the conduct did not present or describe its weight. In short, Ms. Jones did not represent the weight of the substance. Thus, there was insufficient evidence on the weight element to support a conviction of Count II based on represented weight.

[5] Detective Phillips testified that, after he specifically told her that he wanted an ounce, Ms. Jones "told me that she didn't have it with her, that she had to go pick it up from Robert's house." (2/28/17 Trial Tr., p.212, Ls.18-23.) Mr. Wilson notes that if the State had merely called Ms. Jones as a witness it could, presumably, have provided sufficient context by having her testify as to the terms of her deal with Detective Phillips, including what statements were made during their unrecorded and unmonitored telephone calls.

2. The State Failed To Present Substantial Evidence That Mr. Wilson Knew The Substance Ms. Jones Was Dealing Was Methamphetamine, Thus Mr. Wilson's Convictions On Both Counts Must Be Vacated

Mr. Wilson asserts that there is insufficient evidence in the record to support his convictions of both counts because the State did not present evidence that Mr. Wilson knew that the substance Ms. Jones sold to Detective Phillips was methamphetamine.

When interviewed, Mr. Wilson told officers he "go[s] with Regina when she does deals, whatever. I sit in the car, but I go with her." (State's Exhibit No. 5, 11:13:24.) He told them he receives free "dope" from Regina and sometimes lunch. (State's Exhibit No. 5, 11:13:30.) However, "dope" was never identified as meaning "methamphetamine" during the trial,[6] and officers never sought clarification as to what Mr. Wilson meant by "dope" when speaking to Mr. Wilson in the interview room. (State's Exhibit No. 5.)

Because the jury was instructed that the elements of aiding and abetting trafficking required "the defendant knew it was methamphetamine," there is insufficient evidence in the record to support his convictions because there is no evidence in the record that demonstrates that Mr. Wilson knew Ms. Jones was selling methamphetamine. (Augmentation, pp.39-40 (JI Nos. 14, 15).)

Ms. Jones' actions in giving Mr. Wilson "dope" or buying him lunch do not establish that he knew she was selling methamphetamine.[7] The jury was presented with no evidence that he knew Ms. Jones sold methamphetamine. Thus, Mr. Wilson's convictions for two counts of trafficking in methamphetamine must be vacated.

[6] In fact, when asked for the street terms for methamphetamine, Detective Phillips identified, "shit," "white," "white girl," "crystal," "ice," and "glass." (2/28/17 Trial Tr., p.174, L.17 – p.175, L.1.)

[7] In fact, "dope" is commonly used to refer to marijuana. *Merriam-Webster Dictionary*, 213-14 (2016 Ed.) (defining dope as "an illicit, habit-forming, or narcotic drug; *esp* MARIJUANA").

CONCLUSION

Mr. Wilson respectfully requests that this Court vacate his convictions.

DATED this 7th day of February, 2018.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of February, 2018, 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:

RICHARD ALAN WILSON
INMATE #63233
ISCC
PO BOX 70010
BOISE ID 83707

JUNEAL C KERRICK
DISTRICT COURT JUDGE
E-MAILED BRIEF

SCOTT GATEWOOD
CANYON COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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

_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas