IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1996 SESSION

FILED

April 24, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9508-CC-00221**
Appellee,	)	
	)	**BLOUNT COUNTY**
VS.	)	
JENNY WILSON, a/k/a,	)	**HON. D. KELLY THOMAS, JR. ,**
DEBORAH BLUE,	)	**JUDGE**
	)	
Appellant.	)	(Possession of cocaine with intent to
	)	sell or deliver; sale of cocaine;
	)	delivery of cocaine)

FOR THE APPELLANT:

DONALD A. BOSCH
2000 First Tennessee Plaza
Knoxville, TN 37929
(On Appeal)

KEVIN W. SHEPHERD
318 Court St.
Maryville, TN 37801
(At Trial)

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

EUGENE J. HONEA
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

MIKE FLYNN
District Attorney General

EDWARD P. BAILEY, JR.
Asst. District Attorney General
Blount County Courthouse
Maryville, TN 37801

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant[1] was indicted for possession of cocaine with intent to sell or deliver, the sale of cocaine, and the delivery of cocaine. After a jury trial, she was convicted of all three offenses which the trial court later merged into a single conviction.[2] In this direct appeal, the defendant challenges the sufficiency of the evidence, and contends that the trial court erred when it denied her motion for a new trial based on newly discovered evidence. We affirm the judgment below.

The defendant was apprehended through the use of a confidential informant, Kim Orange. Officer Jim Harris, director of Blount Metro Narcotics, arranged with Orange for her to make cocaine purchases. Orange was paid fifty dollars ($50) per purchase.

On March 26, 1993, Orange contacted Officer Harris and told him she "had a cocaine deal set up for that afternoon." Officer Harris then met with Orange and furnished her some surveillance equipment, including a tape recorder to record her phone conversations and a radio transmitter. The purpose of the transmitter was to enable officers stationed near Orange's residence to simultaneously monitor and record her conversations with people within her house. Officer Harris also provided Orange the cash

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[1]The defendant was indicted in August 1993 as "Jenny Wilson, Alias." In the technical record of this matter, which includes several earlier indictments also referencing the name "Jenny Wilson, Alias," is an order entered March 16, 1989, whereby these other indictments were amended to change the name to "Debra Cole." In September 1993, the defendant, by her attorney, filed a motion in this case in which her name is listed as "Deborah Cole Blue." Subsequent pleadings in this case also designate her name as "Deborah Blue." The defendant's presentence report lists her name as "Deborah Cole Wilson Blue." The report also indicates that she is currently married to a Mr. Blue and that her ex-husband's last name is "Cole." Her maiden name is "Wilson." The policy of this Court is to use the indicted name.

[2]Because all three indicted offenses arose out of a single sale of cocaine, principles of double jeopardy prohibit the defendant from being convicted of all three offenses. State v. Williams, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981).

needed to make the buy.

After giving her the equipment, Officer Harris returned to his office. Shortly thereafter, Orange called him and told him that she had recorded a phone call. Officers Harris and Scott Carpenter then stationed themselves near Orange's house, arriving at 2:20 p.m. About thirty minutes later, Leonard Brantley drove up and went into Orange's residence. While he was in the house, the officers listened to and taped his conversation with Orange. After two minutes, Brantley left and drove away. The police did not follow him. A few minutes later, Orange walked to the officers' car, returned the surveillance equipment, and delivered a plastic bag containing cocaine.

Prior to Brantley's arrival, Orange recorded two phone calls with the defendant made at approximately 2:10 p.m. The first of these phone calls consisted of the following conversation:

> Defendant: Hello.
>
> Orange: Hey, Jenny.
>
> Defendant: Yeh.
>
> Orange: I forgot. Uh . . . uh . . . you can't get more than a 16th for me can you?
>
> Defendant: Yeh, yeh, but let me know what you want, I need to know what you want, I mean, I mean, I can't be guessin' what you want.
>
> Orange: How much uh, how much would an eight ball run?
>
> Defendant: I don't like to talk on the phone, you know that.
>
> Orange: Well then just do the 16th then.
>
> Defendant: Alright, let's see . . . about 160 or something like that . . . 170 or something like that . . . I think.
>
> Orange: No, just get the 16th and I check back with you or something next time. Ok bye.

Defendant: Ok.

The second recorded phone call went as follows:[3]

Defendant: Yeh?

Orange: Did you get to hold to him?

Defendant: Yeh, . . . they're on their way now to come and get it for you.

Orange: They gotta come to your house . . . ?

Defendant: Yeh.

Orange: And then they be straight on here?

Defendant: Yeh.

Orange: Ok, bye.

At 2:47 p.m., Brantley arrived and had the following conversation with Orange in her house:[4]

Orange: What have you got for me? . . . What you got?

Brantley: Rocks.

Orange: . . . (illegible)[sic] . . . ninety-five?

Brantley: Yes.

Orange: What you been up to today?

Brantley: . . . (illegible)[sic] . . .

Orange: Rippin and running?

Brantley: Had to go to work.

Orange: [blank]

Brantley: Said I had to go to work today.

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[3] These are verbatim repetitions of the written transcripts of the recorded phone calls, which were introduced into evidence.

[4] This is also a duplicate of the written transcript prepared from the tape recorded conversation and introduced into evidence.

Orange: (Counting) 60, 80, 90, 95. That should take care of you.

Brantley: I hear you.

Orange: Allright. Appreciate it. I might holler at you later.

Brantley: Ok.

Orange: Tell her I said appreciate it.

Brantley: Ok.

Both Officer Harris and Orange testified that they recognized the voice in the phone calls as the defendant's. Officer Harris also testified that an "eight-ball" is an eighth of an ounce of cocaine, or approximately three and one-half grams, and that a "sixteenth" is one-half of an eight-ball.

Orange testified that Brantley had delivered to her the same amount of cocaine that she had ordered from the defendant. She testified that Brantley had had no way of knowing to deliver that quantity of cocaine to her, or how much he was supposed to be paid for it, except through her conversations with the defendant. She also testified that she had not known Brantley would be the delivery boy until he got there, although she also testified that he had a reputation as a "running boy." On cross-examination, she denied that the cocaine had already been in her house. She also denied ever having dealt drugs, although she admitted that she had used cocaine in the past, having quit using it in 1991.

The defendant argues that no one testified to having seen her in possession of, selling or delivering the cocaine; that no one testified that Brantley had picked up the cocaine from her; and that no one testified that Brantley had delivered the buy money to her. She argues that all of the evidence against her is circumstantial and

that it is not sufficient to support her conviction.

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

We must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Although much of the evidence of the defendant's guilt is circumstantial in

nature, it is a well established principle of law in this state that circumstantial evidence alone may be sufficient to support a conviction. State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). However, in order for this to occur, the circumstantial evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his [or her] innocence and must exclude every other reasonable theory or hypothesis except that of guilt." State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). In addition, "it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime." Tharpe, 726 S.W.2d at 896. Moral certainty as to each element of the offense is required, but absolute certainty is not. Tharpe, 726 S.W.2d at 896.

While following the above guidelines, this Court must remember that the jury decides the weight to be given to circumstantial evidence and that "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury." Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958); State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985); Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970).

The testimony at trial established that Orange had three phone conversations with the defendant, two of which were recorded, in which she requested to purchase a “sixteenth” of cocaine, and in which the price of this buy was set. The testimony further established that, within less than an hour of these conversations, Brantley drove up to Orange’s house and delivered the agreed upon amount of cocaine for the agreed upon price. There was no evidence whatsoever that Brantley had obtained the cocaine from anyone other than the defendant.

Although the defendant spends many words arguing that the State never proved that she possessed the cocaine either actually or constructively, we disagree. The second recorded phone call between the informant and the defendant reveals that the person who will deliver the cocaine must first come to the defendant's house to pick it up. Specifically, when the informant asked if "they" have to come to "your house" to get "it," the defendant replied yes. Thus, the jury could reasonably conclude that the cocaine was located at the defendant's residence. "If it can be shown that a defendant was an owner or had possession of the premises [where the drugs are located], an inference is created that the defendant had control over or possession of the contraband. It is a jury question as to ownership of drugs based on occupancy." State v. Ash, 729 S.W.2d 275, 280 (Tenn. Crim. App. 1986) (citation omitted).

The evidence in this case was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant possessed the cocaine at issue with the intent to sell or deliver it, that she did sell it, and that she arranged for its delivery. Accordingly, the defendant's conviction is affirmed.

As to the defendant's contention that the trial court erred when it did not grant her motion for new trial based on newly discovered evidence, we again disagree. When deciding whether or not the evidence merits the granting of a new trial, the trial court must determine whether the result of the trial would likely be changed if the evidence were produced. Evans v. State, 557 S.W.2d 927, 938 (Tenn. Crim. App. 1977). The granting or refusal of a new trial on the basis of newly discovered evidence rests within the sound discretion of the trial court. Hawkins v. State, 220 Tenn. 383, 417 S.W.2d 774, 778 (1967).

The "newly discovered evidence" in this case consisted in part of Orange's misdemeanor arrest for drug-related activity which she allegedly engaged in after the trial. The trial court found that this was not "the type of evidence that is contemplated by newly-discovered evidence to justify a new trial." The trial court was correct in this respect because the activity for which Orange was arrested occurred after the trial. The concept of newly discovered evidence involves evidence which actually existed as of the time of trial, but went undiscovered through no lack of diligence on the part of the defendant (or her counsel).

Also presented as newly discovered evidence was Brantley's testimony that he had not obtained the cocaine from the defendant on the day in question, and that he had not delivered any cocaine to Orange on the day in question. Brantley had been served on the morning of the new trial hearing with an indictment charging him with possessing, selling and delivering cocaine in the same incident for which the defendant was convicted. After hearing Brantley's testimony, the trial court found

> that, number one, he [Brantley] has a serious felony record, [and] number two, he has trafficked in drugs before and . . . he is charged as a co-defendant or is indicted for the same transaction that [the defendant] was convicted of. His demeanor on the witness stand does not do anything to help his credibility. And when taken together with his record and his testimony about his dealings in controlled substances, his testimony that he was not at Ms. Orange's home on that day, I don't think, is going to carry much weight and is not very apt to affect the outcome.

The defendant has not shown that the trial court abused its discretion in determining that Brantley's testimony was not likely to have resulted in her acquittal. Accordingly, we agree with the trial court's denial of the defendant's motion for a new trial, and the judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

_____
JOE B. JONES, Judge

_____
DAVID H. WELLES, Judge