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SUMMARY  
May 2, 2024

**2024COA46**

**No. 23CA0247, *People v. Rodriguez* — Crimes — Conspiracy to Distribute a Controlled Substance — Buyer-Seller Rule**

A division of the court of appeals interprets and expands on *People v. Lucero*, 2016 COA 105, in which another division adopted the buyer-seller rule in the context of a conspiracy to distribute a controlled substance charge. In so doing, this division rejects the premise that a proposed one-time sale of an ounce of methamphetamine between strangers establishes, by itself, a conspiracy to distribute a controlled substance. Concluding that insufficient evidence supported the defendant's conviction, the division vacates the conviction and remands the case with directions to enter a judgment of acquittal.

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Court of Appeals No. 23CA0247  
Weld County District Court No. 21CR2471  
Honorable Julie C. Hoskins, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jessie Rodriguez, Sr.,

Defendant-Appellant.

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JUDGMENT VACATED AND CASE  
REMANDED WITH DIRECTIONS

Division II  
Opinion by JUDGE FOX  
Schutz and Moultrie, JJ., concur

Announced May 2, 2024

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¶ 1 Defendant, Jessie Rodriguez, Sr., appeals the judgment of conviction entered on a jury verdict finding him guilty of conspiracy to distribute a controlled substance. Rodriguez asks us to decide whether a proposed one-time sale of an ounce methamphetamine between strangers can establish, by itself, a conspiracy to distribute a controlled substance. Expanding on the guidance provided by *People v. Lucero*, 2016 COA 105, in which a division of this court adopted the buyer-seller rule in the context of a conspiracy to distribute a controlled substance charge in Colorado, we conclude that insufficient evidence supported Rodriguez’s conviction. Thus, we vacate the judgment of conviction and remand the case with directions to enter a judgment of acquittal.

### I. Background

¶ 2 Weld County Drug Task Force Investigator Valentin Oliveros received a tip about Rodriguez. Oliveros contacted Rodriguez by phone, and the parties agreed that Oliveros would purchase an ounce (twenty-eight grams) of methamphetamine from Rodriguez for \$220. The next day, Rodriguez increased the price to \$250. Oliveros agreed and arranged a meeting place. Oliveros primarily communicated with Rodriguez in Spanish.

¶ 3 A different investigator, Brady Jackson, appeared at the controlled drug buy and spoke to Rodriguez in English. Jackson testified that Rodriguez came to the meeting place and got into his car but was immediately apprehensive. Rodriguez eventually called Jackson an “undercover cop” and left the scene without completing the transaction.<sup>1</sup> Officers did not follow, search, or arrest Rodriguez at the scene, but they arrested him later. No methamphetamine or drug paraphernalia was recovered from Rodriguez at the scene or at his subsequent arrest.

¶ 4 The prosecution charged Rodriguez with a single count of conspiracy to distribute a controlled substance. A jury found Rodriguez guilty as charged. The court then sentenced Rodriguez to four years in the Department of Corrections’ custody.

¶ 5 On appeal, Rodriguez argues that the prosecution failed to present sufficient evidence to support his conviction and that the

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<sup>1</sup> The interaction between Jackson and Rodriguez was captured on video and admitted into evidence, but the exhibit is not in our appellate record. The earlier conversations between Rodriguez and Oliveros, while recorded, were not introduced into evidence because they were conducted in Spanish.

court plainly erred by failing to properly instruct the jury on the law applicable to the charged offense.

## II. Discussion

¶ 6 Rodriguez asserts that insufficient evidence supported his conspiracy to distribute a controlled substance conviction because there was no evidence of his agreement with Oliveros to engage in the illicit purpose of distributing drugs. At most, Rodriguez claims, the prosecution proved a buyer-seller relationship, which is insufficient to sustain a conspiracy to distribute a controlled substance conviction.

### A. Standard of Review and Applicable Law

¶ 7 “We review sufficiency of the evidence claims de novo.” *People v. Donald*, 2020 CO 24, ¶ 18. In doing so, we review the evidence as a whole and in the light most favorable to the prosecution to determine if the evidence is “substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt.” *Id.* (quoting *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010)). And we give the prosecution the benefit of every reasonable inference that might fairly be drawn from the evidence. *Id.* at ¶ 19. “Such inferences, however, must be

supported by a ‘logical and convincing connection between the facts established and the conclusion inferred.’” *Id.* (quoting *People v. Perez*, 2016 CO 12, ¶ 25). A verdict “cannot be supported by guessing, speculation, conjecture, or a mere modicum of relevant evidence.”<sup>2</sup> *Id.* (quoting *Perez*, ¶ 25).

¶ 8 To prove the conspiracy to distribute charge, the prosecution had to show that Rodriguez “knowingly . . . conspire[d] with one or more other persons, to . . . distribute . . . a controlled substance.” § 18-18-405(1)(a), C.R.S. 2023.

¶ 9 Methamphetamine is a controlled substance. § 18-18-204(2)(c)(II), C.R.S. 2023. “Distribute” means “to deliver other than by administering or dispensing a controlled substance, with or without remuneration.” § 18-18-102(11), C.R.S. 2023. “Deliver”

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<sup>2</sup> Rodriguez cites *United States v. Johnson*, 592 F.3d 749, 754-56 (7th Cir. 2010), for the proposition that evidence establishing two equally plausible inferences (one favoring innocence and the other favoring guilt) is insufficient to support a conviction because the jury was necessarily required to entertain a reasonable doubt. Because we conclude that the evidence was insufficient to support Rodriguez’s conviction even without applying this doctrine, we express no opinion on its applicability to sufficiency challenges in Colorado.

means “to transfer or attempt to transfer a substance, actually or constructively, from one person to another.” § 18-18-102(7).

¶ 10 Colorado’s general conspiracy statute provides that “[a] person commits conspiracy to commit a crime if, with the intent to promote or facilitate its commission, he agrees with another person or persons that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime.” § 18-2-201(1), C.R.S. 2023; *see also Lucero*, ¶ 12 (referencing the general conspiracy statute to inform the division’s determination of the meaning of conspiracy to distribute a controlled substance). One of the conspirators must perform an overt act “in pursuance of” the conspiracy. § 18-2-201(2).

¶ 11 “[T]he crime of conspiracy requires two mental states: (1) the defendant must possess the specific intent to agree to commit a particular crime, and (2) he or she must possess the specific intent to cause the result of the crime that is the subject of the agreement.” *People v. Samson*, 2012 COA 167, ¶ 44. “Conspiracy requires proof of a ‘real agreement, combination, or confederation with a common design. (Mere passive cognizance of the crime to be committed or mere negative acquiescence is not sufficient.)”

*Lucero*, ¶ 13 (quoting *Bates v. People*, 179 Colo. 81, 85, 498 P.2d 1136, 1138 (1972)).

¶ 12 In 2016, a division of this court held that a buyer-seller relationship alone does not constitute a conspiracy to distribute a controlled substance. *Id.* at ¶ 26. “[B]ecause an agreement to ‘the same joint criminal objective’ is the core of a conspiracy, the absence of such an agreement dooms a conspiracy conviction.” *Id.* at ¶ 24 (quoting *United States v. Dekle*, 165 F.3d 826, 829 (11th Cir. 1999)). Thus, “[t]o prove the requisite conspiratorial agreement to distribute drugs, the prosecution must proffer evidence of an agreement to advance further distribution of the drugs to others beyond the alleged conspirators.” *Id.* at ¶ 26. “A sale for the buyer’s personal consumption, as distinct from a sale for resale, does not a conspiracy make.” *Id.* at ¶ 20 (quoting *United States v. Mancari*, 875 F.2d 103, 105 (7th Cir. 1989)). But the foregoing principle does not apply to buyers or sellers if the evidence supports a finding that they shared a conspiratorial purpose to further distribute the controlled substance. *Id.* at ¶ 32.

¶ 13 *Lucero* provides some guidance on the type of evidence that would support a finding of a shared purpose to distribute drugs.



For example, the frequency of transactions and the quantity of the substance transferred, if significant, can “permit the inference of further distribution.” *Id.* at ¶ 33. On the other hand, “evidence that the parties understood their transactions to do no more than support the buyer’s personal drug habit is antithetical to a finding of conspiracy.” *Id.* at ¶ 35 (quoting *Dekle*, 165 F.3d at 829-30).

¶ 14 The People assert that the *Lucero* division “explicitly referenced the possibility of proving the further intent to distribute based on the quantity of drugs alone.” In *Lucero*, the defendant received one pill from her coworker for pain relief “[s]everal times” over a year-and-a-half period. *Id.* at ¶ 4. The division said, “[T]he record does not show — and the prosecution did not argue — that the amount of the controlled substance transferred each time was significant enough to permit the inference of further distribution.” *Id.* at ¶ 33. We believe that, at most, the *Lucero* division opined on the possibility that a relationship between the frequency of transactions and quantity transferred, if significant, could permit an inference of further distribution. *See id.* (first citing *United States v. Parker*, 554 F.3d 230, 238-39 (2d Cir. 2009); and then citing *United States v. Flores*, 149 F.3d 1272, 1277 (10th Cir. 1998)).

¶ 15 In *Parker*, a case on which the *Lucero* division relied, the Second Circuit emphasized the importance of an ongoing business relationship between a seller and a buyer to establish a conspiracy to distribute. See *Parker*, 554 F.3d at 235-39. Such a relationship might be evidenced by the prior existence of a drug-selling organization with which the buyer wants to associate himself, repeated transactions between the buyer and seller, the exchange of drugs on credit, the exchange of drugs in wholesale quantities, a seller's business interest in the buyer's ability to resell wholesale quantities, and the buyer's dependence on the seller's organization as a source of stable income. See *id.* at 236-39. The Second Circuit recognized that "a single purchase of drugs, without more, would in many instances not make the purchaser a member of a conspiracy." *Id.* at 238. The court ultimately held that the defendants, who engaged in repeat business with the selling organization, "purchased with such frequency and in such quantity . . . to support a finding that each of them depended on it as a source of supply and thus had a stake in the group's success," such that they could not avoid the conspiracy to distribute conviction based on the buyer-seller rule. *Id.* at 239.

¶ 16 Similarly, in *Flores*, the Tenth Circuit relied on the defendant’s repeated transactions with the buyer, his warning to the buyer not to associate with an individual he thought was an undercover officer, and his role in mediating a dispute between the buyer and the buyer’s customer as proof that he was part of a conspiracy to distribute. 149 F.3d at 1277; *see also United States v. Cushing*, 10 F.4th 1055, 1065 (10th Cir. 2021) (“Mere association, casual transactions, and a solely buyer-seller relationship between the defendant and member of the conspiracy are not sufficient.”); *United States v. Davis*, 995 F.3d 1161, 1166 (10th Cir. 2021) (“[E]vidence of fronting coupled with evidence of repeat drug purchases is sufficient ‘to distinguish a conspiracy from a nonconspiratorial buyer-seller relationship.’”) (citation omitted).

¶ 17 Rodriguez also directs our attention to *United States v. Johnson*, 592 F.3d 749, 754 (7th Cir. 2010), in which the Seventh Circuit held that certain characteristics inherent in an ongoing buyer-seller relationship suggest that the parties also agreed to distribute drugs, including “sales of large quantities of drugs, repeated and/or standardized transactions, and a prolonged relationship between the parties.” Recognizing that additional

evidence might be required to distinguish a conspiracy from a buyer-seller relationship, the Seventh Circuit identified the following circumstances that may inform the analysis:

sales on credit or consignment, an agreement to look for other customers, a payment of commission on sales, an indication that one party advised the other on the conduct of the other's business, or an agreement to warn of future threats to each other's business stemming from competitors or law-enforcement authorities.

*Id.* at 755-56 (footnote omitted) (citing *United States v. Colon*, 549 F.3d 565, 568-70 (7th Cir. 2008)).

## B. Application

¶ 18 Using the foregoing authorities as our guide, we turn to the evidence of a conspiracy to distribute presented here. To prove an agreement to further distribute, the prosecution presented one piece of evidence: the quantity of methamphetamine transferred (one ounce). Oliveros, who was qualified as an expert in drug distribution investigations, testified as follows:

PROSECUTOR: In your training, and experience, Officer, an ounce of meth, is that something that a typical user would get, or is that a . . . larger amount?

WITNESS: Typically, from my training [and] experience, and this comes from talking to numerous individuals directly involved in narcotic distribution, even usage, an ounce is more than a user would normally have. If an individual has in their possession an ounce, it's gonna lead law enforcement to believe that's . . . gonna be further distributed, just based off the amount alone.

¶ 19 On cross-examination, defense counsel asked whether Rodriguez had indicated that he wanted Oliveros to further distribute the ounce, to which Oliveros replied, "I do not believe so, no." Oliveros further testified that he never suggested any intent to further distribute the ounce.

¶ 20 The prosecution presented some evidence of the approximate size of an ounce of methamphetamine. When asked how big an ounce of methamphetamine would appear if packaged, Oliveros responded that it would be "slightly bigger" than a Dixie cup, though it could be manipulated into different shapes. Jackson, who was also qualified as an expert in drug distribution investigations, later testified that a Dixie cup is approximately "two-and-three-quarters inches" tall. Jackson then testified that "an ounce of methamphetamine, depending on the package, could look in any shape, or form, and fit almost anywhere."

¶ 21 The prosecution presented no evidence regarding the quantity that a typical methamphetamine user would use each day or buy or possess at any given time.

¶ 22 Thus, we must decide whether an officer's testimony that "typically" an ounce of methamphetamine is "more than a user would normally have," and that an ounce of methamphetamine will "lead law enforcement to believe that's . . . gonna be further distributed, just based off the amount alone," is sufficient evidence to support an inference that Rodriguez and the undercover officer agreed to "the same joint criminal objective" of distributing drugs. *Lucero*, ¶ 24 (citation omitted). We conclude that it is not.

¶ 23 The *Lucero* division opined that the amount of the controlled substance transferred each time, if significant, could permit the inference of further distribution. *Id.* at ¶ 33. We agree. Either the frequency of standardized transactions or the quantity of drugs exchanged, if truly significant, could be sufficient to permit an inference of further distribution. Where neither the frequency nor the quantity alone is significant, the former could be bolstered by evidence of the latter, or vice versa, or by evidence of any of the other factors noted above.

¶ 24 Regarding quantity, Rodriguez agreed to sell Oliveros an ounce of methamphetamine. To be sure, that quantity could have been divided and further distributed. Oliveros testified that an ounce of methamphetamine is “[t]ypically . . . more than a user would normally have.” But we do not believe an ounce, absent supporting evidence, is so significant on its face to permit a reasonable inference of further distribution. Oliveros did not support his opinion with any underlying factual bases — which would have allowed the jury to better assess the credibility of his opinion — including the amount a typical methamphetamine user would buy or possess at any given time, how much a typical user would consume in a day, whether users typically buy methamphetamine in “bulk,” whether an ounce is a common quantity transferred for resale, whether an ounce is a large or small quantity compared to other methamphetamine transactions, and the like.

¶ 25 Without hearing that kind of evidence, the jury was unable to weigh Oliveros’ opinion against objective benchmarks. *See United States v. Tennison*, 13 F.4th 1049, 1060-61 (10th Cir. 2021) (finding sufficient evidence of an agreement to further distribute where the defendant purchased a quarter of a kilogram of methamphetamine

(approximately 8.8 ounces), and where testimony established the comparatively small quantity purchased and used by a typical methamphetamine user). And without those benchmarks, testimony about the size of an ounce of methamphetamine would not have been terribly helpful to jurors unfamiliar with methamphetamine use. For these reasons, the quantity of methamphetamine exchanged is not outcome-determinative in this case.

¶ 26 Further, there was no evidence of repeated dealings between Oliveros and Rodriguez that could have reinforced evidence that the quantity exchanged furthered a conspiracy to distribute. We believe that factor was just as important to the *Lucero* division as the quantity sold, as demonstrated by the opinions it cited: *Parker* and *Flores* both emphasized the importance of an ongoing business relationship between a seller and a buyer to establish a conspiracy to distribute. Having reviewed *Lucero*, the cases it cites, and other persuasive authority, we agree. The quantity here — absent other evidence such as a relationship, prior dealings, financing arrangements, or a shared distribution objective — was insufficient to permit the inference that Oliveros and Rodriguez agreed to “the



same joint criminal objective” of distributing drugs. *Lucero*, ¶ 24 (citation omitted).

¶ 27 For these reasons, even viewing the evidence in the light most favorable to the prosecution and resolving all reasonable inferences in the prosecution’s favor, we conclude that insufficient evidence supported Rodriguez’s conspiracy to distribute conviction.

¶ 28 In light of our disposition, we do not address Rodriguez’s other challenge to his conviction.

### III. Disposition

¶ 29 The judgment is vacated, and the case is remanded for entry of a judgment of acquittal.

JUDGE SCHUTZ and JUDGE MOULTRIE concur.