

66237-6

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NO. 66237-6-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

NOEL B. McLANE,

Appellant.

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BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

JOHN J. JUHL  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2011 JUN -2 AM 10:33

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## **I. ISSUES**

The State presented evidence that Defendant drove a Toyota 4-Runner into an oncoming lane of traffic causing a head on collision with another vehicle. Defendant was found to have been under the influence of or affected by methamphetamine. A glass pipe containing residue and burn marks was found in the debris from the Toyota. The passenger in the Toyota did not recognize the glass pipe and denied having used drugs that day. The glass pipe was identified by a drug recognition expert as drug paraphernalia. Was there sufficient evidence to support the jury's verdict that defendant was guilty of using drug paraphernalia?

## **II. STATEMENT OF THE CASE**

### **A. SUBSTANTIVE FACTS.**

On the morning of September 21, 2009, Jeff King left his home in Monroe, WA, heading for a meeting in Tacoma, WA, in his Land Rover. A little after 6:00 a.m., he turned onto State Route 522. The next thing Jeff King remembers is waking up weeks later in Harborview Medical Center. 2RP 61, 65, 164-167.

Between 6:00—6:30 a.m., Noel McLane was driving Debbie Moore's Toyota 4-Runner on State Route 522. Moore was a passenger in the Toyota. McLane drove across the centerline into

the lane of oncoming traffic and crashed head-on into King's Land Rover. King, Moore, and McLane were all injured and transported to Harborview Medical Center. 2RP 68, 77-80, 97-100, 116, 120-121, 125-127; 3RP 67-68, 122.

Jeff Dickinson, firefighter for Snohomish County Fire District Three, responded to the accident scene and assisted in extracting Moore and McLane from the Toyota and stabilizing them for transport. Dickinson testified that the fire department does not administer methamphetamine; they do not carry methamphetamine on their rigs. 2RP 137-143.

Dr. Lisa Taitsman, orthopedic surgeon at Harborview Medical Center, testified that methamphetamine was not normally administered to patients who had sustained serious injuries in an automobile accident. In fact, Dr. Taitsman had never heard of methamphetamine being used therapeutically in an emergency room. 2RP 120-123.

Deputy Chief Cherie Harris, Monroe Police Department, responded to the accident scene. Harborview requested identification of the female passenger and contact information for family members of the driver of the Land Rover. Deputy Chief Harris located a green jacket amidst the debris next to the Toyota.

In the pocket of the green jacket Deputy Chief Harris found a man's watch and a glass pipe. The glass pipe had burn marks and white residue on it and the bowl was partially broken. Deputy Chief Harris notified Detective Robinson, who photographed and collected the glass pipe as evidence. 2RP 171-180, 189-190; 3RP 5-6.

When Detective Robinson collected the glass pipe as evidence his concern was that the driver of the Toyota might have used the glass pipe to ingest a controlled substance and been impaired. Detective Robinson is a technical collision investigator and a drug recognition expert (DRE). Additionally, Detective Robinson is a DRE instructor at the Criminal Justice Training Commission and the Washington State Patrol. Based on his experience and training, Detective Robinson recognized the glass pipe as an item commonly used to smoke methamphetamine or crack cocaine. Detective Robinson confirmed that the glass pipe could be used to inhale methamphetamine in its broken condition. 3RP 1-2, 5-9, 36-40.

Debbie Moore stated that she and McLane spent the night of September 20-21, 2009, in her 10-by-10 storage shed even though she was sick and had friends who would have let her and McLane

spend the night at their house. Moore admitted having used drugs in the past, but claimed that she and McLane did not consume any drugs that day. Moore stated that she and McLane got up early the next morning and went to get medication for her urinary infection with McLane driving her Toyota. Moore did not recall the collision, only becoming alert and realizing that she had been in an accident. Moore did not recognize the green coat or the glass pipe. 3RP 114-124, 126, 130.

Forensic toxicologist Chris Johnston tested blood, drawn from McLane at Harborview Medical Center after the collision, for drug content. The following drugs were found: methamphetamine; morphine; Diazepam with positive results for the metabolites of Nordiazepam and Tamazepam; and Midazolam. Morphine is a narcotic analgesic pain killer. Diazepam, also known as valium, is a depressant used for anti-anxiety and as a muscle relaxant. Methamphetamine is a stimulant that increases the heart rate, produces rapid thoughts and can cause paranoia or delusion. When initially taken methamphetamine produces a sense of euphoria or well being that can last for a few hours. This "high" is followed by an opposite reaction where the user becomes sleepy and lethargic, having trouble staying awake and paying attention.

Johnston referred to epidemiological studies documenting a large number of cases where a person coming down from using methamphetamine became lethargic or fell asleep and swerved out of or crossed over their lane and caused accidents. 3RP 145-156.

In December 2009, Detective Robinson questioned McLane about the collision. McLane claimed that the other vehicle hit him, but did not have an explanation for why the collision occurred. When asked if he had been using methamphetamine, McLane adamantly denied that he had used methamphetamine. When confronted with the results of the toxicologist, McLane claimed, "I guess somebody must have drugged my pop." 3RP 27- 29, 150.

#### **B. PROCEDURAL FACTS.**

McLane was charge with two counts Vehicular Assault, one count Use of Drug Paraphernalia and one count Possession of a Controlled Substance—less than 40 grams marijuana. CP 81-82. Prior to trial McLane pleaded guilty to the count of possessing marijuana. CP 77-80; 2RP 41-44. After trial the jury found McLane guilty on the two counts of vehicular assault while under the influence of or affected by drugs and the count of use of drug paraphernalia. CP 50-52. McLane was sentenced to 14 months on each count of the Vehicular Assault, concurrent with each other and

concurrent with 90 days on the count of Use of Drug Paraphernalia. McLane was sentenced to 30 days on the marijuana possession to run consecutive to the other counts. CP 34-49; 5RP 17.

### **III. ARGUMENT**

#### **A. SUFFICIENCY OF THE EVIDENCE.**

McLane contends there was insufficient evidence to convict him of use of drug paraphernalia; specifically that the evidence was not sufficient to show that the glass pipe was used to ingest or inhale methamphetamine. Appellant's Brief at 5. McLane's argument ignores evidence presented at trial.

##### **1. Legal Standards.**

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All

reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict).

Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) *citing* State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). Credibility

determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

## **2. Elements Of The Offense.**

The crime, Use of Drug Paraphernalia, is defined by statute, in relevant part, as follows: "It is unlawful for any person to use drug paraphernalia to ... inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor." RCW 69.50.412(1). State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010); State v. Williams, 62 Wn. App. 748, 752-53, 815 P.2d 825 (1991) review denied, 118 Wn.2d 1019, 827 P.2d 1012 (1992) (possession of drug paraphernalia containing residue is sufficient to support a charge of use of the paraphernalia). In the present case, the jury was instructed:

To convict the defendant of the crime of use of drug paraphernalia, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 21<sup>st</sup> day of September, 2009, the defendant used drug paraphernalia to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance Methamphetamine; and

(2) That this act occurred in the State of Washington.

Instruction 14. CP 70. McLane does not contest that the act occurred in the State of Washington, on or about September 21, 2009.

**a. Drug Paraphernalia**

The drug paraphernalia introduced as evidence at trial was the glass pipe found in the green coat amidst the debris from the Toyota. Deputy Chief Harris stated that the glass pipe contained residue. 2RP 179; 3RP 5-6. The existence of any residue of controlled substances on the object can be considered in determining whether that object is drug paraphernalia. RCW 69.50.102(b)(5). Additionally, Detective Robinson identified the glass pipe as drug paraphernalia. 3RP 5-7. Expert testimony concerning the use of an object can be considered in determining whether that object is drug paraphernalia. RCW 69.50.102(b)(14). In the present case there was sufficient evidence to support a finding that the glass pipe was drug paraphernalia.

**b. Methamphetamine**

The presence of methamphetamine in McLane's blood, confirmed that he had consumed methamphetamine. 3RP 150-156. That evidence was sufficient to support a finding in the

present case that methamphetamine had been introduced into McLane's body.

**c. Glass pipe used to inhale methamphetamine**

The glass pipe contained residue and was identified by an expert as drug paraphernalia. See RCW 69.50.102(b)(5) and (14). 2RP 179; 3RP 5-7. RCW 69.50.102(b) factors can establish an inference that paraphernalia was used. State v. O'Meara, 143 Wn. App. 638, 643, 180 P.3d 196 (2008) (citing State v. Neeley, 113 Wn. App. 100, 108, 52 P.2d 539 (2002)). The methamphetamine in McLane's blood was not administered at the scene of the collision. 2RP 142-143. Nor was the methamphetamine administered to McLane at Harborview Medical Center. 2RP 123.

Here, the combined facts of the timing and location of glass pipe found in the debris from the Toyota, the presence of methamphetamine in McLane blood, McLane's physical behavior demonstrated by his driving across the centerline and causing a head-on collision, and Moore's denial of using drugs and not recognizing the glass pipe, raise a reasonable inference that McLane used the glass pipe to introduce methamphetamine into his body. State v. Neeley, 113 Wn. App. at 108. "Circumstantial evidence can be used where the inferences drawn by the jury are

reasonable and the evidence supporting the jury's verdict is substantial." State v. Bingham, 105 Wn.2d 820, 824, 719 P.2d 109 (1986). It makes no difference whether the evidence is direct, circumstantial, or a combination of the two, so long as the evidence is sufficient to convince a jury of the defendant's guilt beyond a reasonable doubt. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). Circumstantial evidence is sufficient to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978) (*citing* State v. Lewis, 69 Wn.2d 120, 417 P.2d 618 (1966)). There was sufficient evidence to support the jury's finding that McLane used the glass pipe to ingest, inhale, or otherwise introduce methamphetamine into his body.

McLane's argument that the green coat and the glass pipe did not belong to him and that he did not use methamphetamine before the accident are without import. 4RP 6-10. Defense evidentiary inference cannot be used to attack sufficiency of evidence to convict. State v. Jackson, 62 Wn. App. at 58 n. 2; State v. Randecker, 79 Wn.2d at 521. In the present case, the jury did not believe McLane's argument. That was its prerogative. State v. Koss, 158 Wn. App. 8, 16, 241 P.3d 415 (2010); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (the trier of

fact resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence). Rather, the jury concluded that McLane used the glass pipe to smoke methamphetamine; that finding is supported by the evidence.

#### **IV. CONCLUSION**

For the reasons stated above, the appeal should be denied.

Respectfully submitted on June 1, 2011.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:

  
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JOHN J. JUHL, WSBA #18951  
Deputy Prosecuting Attorney  
Attorney for Respondent