

No. 36036-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON
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DEPUTY
COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHANCE MANWELL LAKEY RIVERS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 06-1-04001-7
The Honorable K.A. van Doorninck, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The State failed to present sufficient evidence to support Appellant's conviction of unlawful delivery of a controlled substance.
2. The State failed to present sufficient evidence to support Appellant's conviction of unlawful possession of a controlled substance with intent to deliver.
3. The State failed to present sufficient evidence to support the two special verdicts finding that Appellant was armed with a firearm when he committed the two drug offenses.

B. Issues Pertaining to the Assignments of Error

1. Where the State failed to show that the informant was not in possession of a baggie of crack cocaine prior to her participation in the controlled buy, did the State fail to present sufficient evidence to prove that Appellant delivered a controlled substance? (Assignment of Error 1)
2. Where the evidence only shows that Appellant possessed items commonly possessed by drug users, did the State fail to present sufficient evidence to prove that Appellant intended to deliver a controlled substance? (Assignment of

Error 2)

3. Where the evidence only shows that the firearm was within reach of the Appellant, did the State fail to present sufficient evidence to prove a nexus or connection between the firearm and the drug offenses? (Assignment of Error 3)

II. STATEMENT OF THE CASE

A. Substantive Facts

City of Lakewood Police Officer Ryan Hamilton arrested a woman for suspicion of prostitution on August 25, 2006. (02/08/07 RP 11)¹ In an effort to escape misdemeanor prostitution charges, the woman offered to purchase drugs from a man she identified as Chance, thus providing grounds to arrest and charge Chance for violating felony drug laws. (02/08/07 RP 11, 13, 21) The woman informant retrieved a slip of paper with the letter "C" and a phone number on it, called the number, and arranged to meet Chance at a location on Bridgeport Way in Lakewood. (02/08/07 RP 13)

Hamilton testified that the informant was then strip-searched, although he did not conduct the search himself. (02/08/07 RP 10) Hamilton also photo-copied and recorded several dollar bills and

¹ Citations to the Verbatim Reports of Proceedings will be to the date of the proceeding followed by the page number.

gave them to the informant. (02/08/07 RP 17) They then traveled together to the pre-arranged location. (02/08/07 RP 10, 14) Hamilton observed a silver-colored PT Cruiser drive into the parking lot, and the informant went to the car and got inside. (02/08/07 RP 15) Hamilton saw the driver, and identified him as Chance Rivers. (02/08/07 RP 15) Rivers and the informant remained in the car for a few minutes, then the informant returned to the police vehicle. (02/08/07 RP 16) The informant handed Hamilton a baggie of crack cocaine. (02/08/07 RP 16, 17) Hamilton then released the informant, and no charges were filed against her. (02/08/07 RP 19, 23)

Assisting units stopped the PT Cruiser a short distance away, and took Chance Rivers into custody. (02/08/07 RP 34, 43) Rivers was placed into a patrol vehicle, but was later removed and searched after officers observed him "squirming" and moving around in the back seat. (02/08/07 RP36-37) Police observed a small bag of crack cocaine fall out of Rivers' pant leg, and found another small bag of crack cocaine on the back seat floor board of the police vehicle. (02/08/07 RP 48, 37) Police also found the pre-recorded dollar bills in Rivers' shirt pocket. (02/08/07 RP 60)

During a search of the PT Cruiser, police found a Crown

Royal bag containing a razor blade and a rock of crack cocaine, papers with the letter "C" and a phone number printed on them, and a digital scale. (02/08/07 RP 47, 77, 64, 96, 98, 100, 101) Police also found a loaded, operable firearm on the front driver's side floorboard. (02/08/07 RP 44-45, 107-08) When asked about the crack cocaine, Rivers said he was only holding it for someone else. (02/08/07 RP 49) He also told police he knew they would find the firearm. (02/08/07 RP 49)

Rivers' friend, Tyrone Richardson, was in the PT Cruiser when it was stopped by Lakewood police. (02/12/07 RP 5-6) He stated that he never saw the drugs or the gun that day, and never saw Rivers in possession of the drugs or the gun. (02/12/07 RP 9-10) A second friend, Reginald Jenkins, testified that the firearm belonged to him, and that he had accidentally left it in Rivers' car earlier that day. (02/08/07 RP 117)

Rivers testified that neither the drugs nor the PT Cruiser belonged to him. (02/12/07 RP 17) He testified the drugs were for personal use, and he denied selling the informant any drugs. (02/12/07 RP 18, 20) He also testified that the firearm belonged to his friend, and he did not know it was in the car that day. (02/12/07 RP 18-19)

B. Procedural History

The State charged Chance Manwell Lakey Rivers with one count of delivery of a controlled substance (RCW 69.50.401), one count of possession of a controlled substance with intent to deliver (RCW 69.50.401) and one count of unlawful possession of a firearm (RCW 9.41.040). (CP 7-8) The State alleged that Rivers was armed with a firearm when he committed the drug crimes. (CP 7-8)

A jury convicted on all charges, and found that Rivers was armed with a firearm. (02/13/06 RP 3-4; CP 47-51) Rivers had no prior criminal history. (CP 53-54, 63) But with the inclusion of two consecutive 36-month firearm enhancements, his standard range exceeds the 10-year statutory maximum. (CP 53-55, 63; 03/02/07 RP 4) The trial court therefore sentenced Rivers to 120 months of confinement. (CP 66; 03/02/07 RP 7) This appeal timely follows. (CP 73)

III. ARGUMENT & AUTHORITIES

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90

S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

In this case, the State failed to establish beyond a reasonable doubt that Rivers delivered a controlled substance, that he intended to deliver a controlled substance, or that he was armed with a firearm.

A. Delivery of a Controlled Substance

Guilt of the crime of delivery of a controlled substance is established by proof that the defendant delivered a controlled substance and that the defendant knew that the substance delivered was a controlled substance. *State v. Evans*, 80 Wn. App. 806, 814 n.17, 911 P.2d 1344 (1996); RCW 69.50.401(a). Here, the State’s evidence did not establish that Rivers delivered a controlled substance to the informant.

The informant did not testify at trial. Police testimony

established only that the informant went to Rivers' car then returned to the patrol car; that upon her return the informant had a baggie of cocaine; and that Rivers later had the pre-recorded dollar bills. (02/08/07 RP 15-16, 60) Officer Hamilton testified that the informant was searched before the meeting with Rivers, but he did not conduct the search himself. (02/08/07 RP 14) His testimony was based on his belief of what occurred, not his actual personal knowledge of what occurred. And none of the State's witnesses testified that the informant did not possess cocaine before she approached Rivers' car.

Accordingly, the evidence does not establish, beyond a reasonable doubt, that the informant received the baggie of cocaine from Rivers. This conviction must therefore be reversed.

B. Possession with Intent to Deliver

It is unlawful for any person to possess a controlled substance with intent to deliver. RCW 69.50.401(a). To support a conviction, the State must prove that the defendant intended to deliver the controlled substance—presently or at some time in the future. *State v. Vike*, 125 Wn.2d 407, 411-12, 885 P.2d 824 (1994). Evidence of an intent to deliver must be sufficiently compelling, and “the specific criminal intent of the accused may be inferred from the

conduct [only] where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession. *State v. Brown*, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). Washington case law forbids the inference of an intent to deliver based on “bare possession of a controlled substance, absent other facts and circumstances[.]” *State v. Harris*, 14 Wn. App. 414, 418, 542 P.2d 122 (1975).

For example, in *State v. Davis* police located a bread sack with six individually wrapped baggies of marijuana, two baggies of marijuana seeds, a film canister containing marijuana, a baggie with marijuana residue inside, a box of sandwich baggies, a pipe used for smoking marijuana, and a number of knives. 79 Wn. App. 591, 593, 904 P.2d 306 (1995). At trial, a police officer testified that it was not customary for people who simply use marijuana to have that “quantity with that packaging.” 79 Wn. App. at 593. On appeal, the court nevertheless found this evidence insufficient to establish that Davis possessed the intent to deliver. 79 Wn. App. at

596.

To establish intent to deliver in this case, the State presented evidence that Rivers possessed several rocks of crack cocaine, a razor blade, a scale, and cards with a phone number on them. (02/08/07 RP 37, 47, 48, 64, 77) These items do not establish, beyond a reasonable doubt, that Rivers possessed the drugs with the intent to deliver them to others, rather than for personal use. None of the State's witnesses testified that what they found was common to drug dealing enterprises. None of the State's witnesses testified that the amount of drugs found was larger than generally possessed for personal use. One Detective testified that dealers use scales to measure out units of a drug, but he also testified that it is common for a drug user to have a scale for that purpose. (02/08/07 RP 67)

The State's evidence did not establish that Rivers intended to deliver the cocaine, or that the cocaine was not for Rivers' personal use. This conviction must also be reversed.

C. Armed with a Firearm Special Verdicts

A person is potentially subject to a deadly weapons enhancement if armed while committing a crime. RCW 9.94A.533(3), (4), .602. A person is "armed" if a weapon is easily

accessible and readily available for use, either for offensive or defensive purposes, and there is a connection between the defendant, the weapon, and the crime. *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) (quoting *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). To support a finding that a defendant was armed with a deadly weapon during the commission of a crime, there must be a nexus between the weapon and the crime. *State v. O'Neal*, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007) (quoting *State v. Schelin*, 147 Wn.2d 562, 575-76, 55 P.3d 632 (2002)). A person is not armed simply because a weapon is present during the commission of a crime. *Schelin*, 147 Wn.2d at 570 (the mere presence of a weapon is not sufficient to impose a firearm enhancement).

Generally, in drug possession cases, courts have found the required nexus between the drug crime and a weapon where there is evidence from which a jury can infer that the weapon was used to protect the possession, distribution or manufacture of the drugs, and was therefore used in furtherance of the crime. For example, in *Schelin*, the Court concluded that the jury could infer that the defendant was using the weapon to protect his marijuana grow operation, where the operation was located in the same room in

which the officers found the defendant and the easily-accessible weapon. 147 Wn.2d at 574-75. In *State v. Gurske*, the court found a nexus where officers found three grams of methamphetamine, the defendant's wallet and a firearm all in a backpack located within arm's reach of the defendant. 120 Wn. App. 63, 65-66, 83 P.3d 1051 (2004).

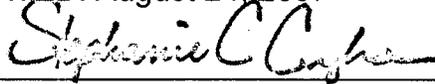
But the evidence here does not support a conclusion that the firearm was being used by Rivers in furtherance of the crimes of possessing or delivering the cocaine. The drugs and the firearm were not found in the same location within the car. There was no evidence that Rivers owned the firearm, placed the firearm in the car, or had ever even handled the firearm. There is simply nothing in the record to show that the firearm was in any way connected to the possession or delivery of the crack cocaine. The special verdicts were based on the mere presence of the firearm, which is not sufficient to support the imposition of the two firearm sentence enhancements. See *Schelin*, 147 Wn.2d at 570. The enhancements must be stricken and Rivers must be resentenced.

IV. CONCLUSION

The State failed to meet its burden of proving, beyond a reasonable doubt, all the essential elements of the crimes and the

special firearm enhancement. Therefore, the evidence is insufficient to support the verdicts, and the judgment and sentence entered against Rivers should be reversed.

DATED: August 24, 2007



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CERTIFICATE OF MAILING

I certify that on 08/24/2007, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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