

NO. 36316-0

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOHN DION HERRING, APPELLANT

FILED
COURT OF APPEALS
DIVISION II
08 FEB 27 PM 2:09
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 06-1-03873-0

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Was their sufficient evidence for a trier of fact to find defendant guilty of unlawful delivery of a controlled substance when defendant was an accomplice to the delivery? 1

 2. Was there sufficient evidence for a trier of fact to find defendant guilty of unlawful possession of a controlled substance with intent to deliver when defendant had constructive possession of the controlled substance? 1

B. STATEMENT OF THE CASE. 1

 1. Procedure..... 1

 2. Facts 2

C. ARGUMENT..... 5

 1. THE EVIDENCE AGAINST DEFENDANT WAS SUFFICIENT FOR A JURY TO FIND HIM GUILTY OF UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE AND UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER..... 5

D. CONCLUSION. 12

Table of Authorities

State Cases

<u>In re Wilson</u> , 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).....	6
<u>State v. Bockman</u> , 37 Wn. App. 474, 491, 682 P.2d 925, <u>review denied</u> , 102 Wn.2d 1002 (1984).....	7
<u>State v. Callahan</u> , 77 Wn.2d 27, 29, 459 P.2d 400 (1969)	10
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	6
<u>State v. Carothers</u> , 84 Wn.2d 256, 262, 525 P.2d 731 (1974), <u>overruled on other grounds in State v. Harris</u> , 102 Wn.2d 148, 685 P.2d 584 (1984)	7
<u>State v. Galista</u> , 63 Wn. App. 833, 839, 822 P.2d 303 (1992)	7
<u>State v. Gerber</u> , 28 Wn. App. 214, 217, 622 P.2d 888 (1981).....	5
<u>State v. Green</u> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	5
<u>State v. Lubers</u> , 81 Wn. App. 614, 619, 915 P.2d 1157 (1996).....	5
<u>State v. Munden</u> , 81 Wn. App. 192, 196, 913 P.2d 421 (1996)	7
<u>State v. Partin</u> , 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).....	10
<u>State v. Potts</u> , 1 Wn. App. 614, 617, 464 P.2d 742 (1969).....	11
<u>State v. Rangel-Reyes</u> , 119 Wn. App. 494, 499, 81 P.3d 157 (2003)	5
<u>State v. Robinson</u> , 73 Wn. App. 851, 872 P.2d 43 (1994)	9, 10
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	5
<u>State v. Theroff</u> , 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)	5

State v. Weiss, 73 Wn.2d 372, 375, 438 P.2d 610 (1968).....10

State v. Wren, 115 Wn. App. 922, 65 P.3d 335 (2003).....7, 8

Statutes

RCW 9A.08.020(3).....6

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence for a trier of fact to find defendant guilty of unlawful delivery of a controlled substance when defendant was an accomplice to the delivery?
2. Was there sufficient evidence for a trier of fact to find defendant guilty of unlawful possession of a controlled substance with intent to deliver when defendant had constructive possession of the controlled substance?

B. STATEMENT OF THE CASE.

1. Procedure

On August 18, 2006, defendant John Herring was charged in Pierce County Superior Court with unlawful delivery of a controlled substance and unlawful possession of a controlled substance with intent to deliver, under cause number 06-1-03873-0. CP 1-2. On September 14, 2006, an amended information was filed adding the charges of domestic violence court order violation and tampering with physical evidence. CP 5-7. Jury trial began on February 5, 2007 before the Honorable Stephanie Arend. 1RP 5. The jury found defendant guilty of unlawful delivery of a controlled substance, unlawful possession of a controlled substance with

intent to deliver and violation of a domestic violence no-contact order and not guilty of tampering with physical evidence. 8RP 735-6.

On April 27, 2007, defendant's motion for a new trial was denied and sentencing immediately followed.¹ RP 51, 4/27/07. Defendant's offender score of eight put him in the 60-120 month range on the two drug charges and 62-82 on the violation of the domestic violence order though the court could only impose 60 months due to that charge being a class C felony. RP 59, 4/27/07. Defendant was sentenced to the low end of 60 months on all counts. RP 73-4, 4/27/07. Defendant filed this timely appeal. CP 210-222.

2. Facts

On August 17, 2006, defendant John Dion Herring was the passenger in a vehicle driven by Belinda Banks. 4RP 293, 5RP 428, 434, 492-3. Defendant was prohibited from contacting Banks because of a court ordered domestic violence protection order that protected Banks from defendant. 4RP 360, 367. Defendant had been in court that morning for a hearing on the case the protection order stemmed from. 4RP 366. Defendant was in-custody during that hearing. 4RP 366. After the hearing, defendant was released from jail approximately between 11:00 a.m. and 11:15 a.m. on August 17, 2006. 4RP 366. Defendant told

officers Banks picked him up from jail. 5RP 434. Banks then drove to the area of 86th and Hosmer, an area known for drug activity. 4RP 269, 292, 386-7.

Banks stopped in front of a convenience store and confidential informant (CI) R.S.² approached the driver's side of the black Hummer she was driving. 4RP 274, 292-3,387, 5RP 562. The CI conversed with Banks at the open driver's window and purchased \$40 worth of cocaine from Banks around 2:45 p.m. 4RP 293, 296-8, 346, 381, 386-7. The \$40 the CI had to conduct the buy was made up of two twenty dollar bills that had been pre-marked by officers. 4RP 280-3, 285-6. During the time of the delivery, the driver's window was down and a female was observed in the driver's seat. 4RP 293. Also during the time of the delivery, the driver's side backseat window was rolled down and a black male was visible in the backseat on the driver's side of the vehicle. 5RP 563-4. The officers doing surveillance on the CI observed the contact with the Hummer and also observed the Hummer as it drove away from the controlled buy. 4RP 292, 295, 389. The Hummer was stopped moments later. 4RP 392, 394-6. No one got in or out of the Hummer in the few minutes between the buy and the stop. 4RP 392-3.

As the officers stopped the vehicle and ordered the occupants to raise their hands, the only person who did not comply was defendant. 5RP

¹ The grounds for the motion for new trial were different than the issues in this appeal.

430. The Hummer Banks was driving was owned by the father of the front seat passenger. 4RP 292-3, 5RP 550. Defendant was the sole occupant of the backseat. 5RP 428, 469. Defendant was seen bent over, focusing on something below eye level and was slow to comply to the officers commands to show his hands. 5RP 428-31. When contacted, defendant had the buy money, the two marked twenty dollar bills, in his hand. 5RP 449-52. In addition, two bags of cocaine and two crack pipes were on the seat next to defendant. 5RP 454-5, 458, 468. The first bag contained 1.5 grams and the second bag contained 2 grams. 5RP 460. The bags looked like they had been pushed down into the seat. 5RP 454-5, 477. A small amount of cocaine, .05 grams, was also found in Banks' purse. 5RP 454, 524. The cocaine found in the backseat of the car had a street value of about \$100. 5RP 462. The cocaine obtained from the controlled buy, the cocaine in the backseat and the cocaine in Banks' purse all tested positive. 5RP 523, 527, 529. Defendant claimed he didn't know where the money had come from, didn't know what had happened in the car and wasn't sure how drugs came to be near him. 4RP 398-9. Banks plead guilty to unlawful delivery of a controlled substance and unlawful possession of a controlled substance with intent to deliver. 5RP 421 (Exhibit 14), 7a RP 653.

² As R.S. is a confidential informant (CI), the State will refer to the CI using initials.

C. ARGUMENT.

1. THE EVIDENCE AGAINST DEFENDANT WAS SUFFICIENT FOR A JURY TO FIND HIM GUILTY OF UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE AND UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Rangel-Reyes, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. State v. Gerber, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. Theroff, supra, at 593.

Credibility determinations are for the trier of fact and not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Defendant raises two challenges to the sufficiency of the evidence. Defendant contends the evidence was insufficient to find that he acted as an accomplice in the unlawful delivery of a controlled substance. Defendant also contends that there was insufficient evidence to find that he had constructive possession of the controlled substance in the backseat of the vehicle. The evidence was sufficient for the jury to find defendant guilty of both crimes.

- a. There was sufficient evidence for the jury to find defendant guilty of unlawful delivery of a controlled substance as defendant was not only present but also was a participant, meeting the definition of an accomplice.

Sufficient evidence was presented for the jury to find defendant guilty under accomplice liability. RCW 9A.08.020(3) addresses accomplice liability and in relevant part:

“A person is an accomplice of another person in the commission of a crime if: (a) With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.”

More than physical presence and knowledge of the criminal activity of another must be shown to establish a person is an accomplice. In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Defendant must give

aid in order to be considered an accomplice. Aid is defined as any assistance given by words, acts, encouragement, support or presence. State v. Galista, 63 Wn. App. 833, 839, 822 P.2d 303 (1992). “A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.” Id. “The State need not show that the principal and accomplice share the same mental state.” State v. Bockman, 37 Wn. App. 474, 491, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984). As long as the jury is unanimous that the defendant was a participant, it is not necessary that the jury be unanimous as to whether the defendant was a principal or an accomplice where there is evidence of both manners of participation. State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974), overruled on other grounds in State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984), see also, State v. Munden, 81 Wn. App. 192, 196, 913 P.2d 421 (1996). The jury was given instructions consistent with the statute and case law. CP 24-60, instruction 13.

Defendant’s actions in the instant case are similar to the actions of the defendant in State v. Wren, 115 Wn. App. 922, 65 P.3d 335 (2003). Wren engaged in a heroin deal with an undercover officer and Delgado was standing next to Wren during the deal. Id. at 924. Delgado did not say or do anything during the deal but Wren told the officer to give

Delgado the money at the end of the deal. Id. The court found that there was sufficient evidence to support the jury's guilty verdict since Delgado was a short distance away during the deal, she took the money and the marked buy money was found on her person after her arrest. Id. at 926.

In the instant case, defendant was present during the entire delivery in this case. 4RP 293, 392-3, 5RP 428, 434, 492-3, 563-4. There is evidence that the backseat driver's side window was down during the delivery and that defendant was seated in the backseat behind the driver. 5RP 563-4. The main drug supply was found next to defendant. 5RP 454-5, 458, 460. All of the buy money was found in defendant's hand when he was contacted by police. 5RP 449-52. Defendant was the only one making movements when cops approached the car and the only one who didn't comply with their demands immediately. 5RP 428-31. These facts are very similar to Wren and sufficient for the jury to find defendant guilty.

In addition, defendant and Banks had an existing relationship given the existence of a domestic violence protection order that protected Banks from defendant. 4RP 360, 367. Despite the order, Banks is the one who picked defendant up from jail and they headed into an area known for drug activity. 4RP 269, 292, 386-7, 5RP 434.

Evidence was also adduced at the trial about the role of “middlers.” 4RP 312. A middler is a user who takes the money from the buyer and gives the drugs to the buyer. 4RP 312. The real seller who uses the middler to “middle” the deal will then often break off a piece of the rock cocaine and give it to the middler for conducting the deal. 4RP 312. It is reasonable to infer that defendant used Banks as a middler given defendant’s relationship with Banks, the fact that she only had .05 grams of cocaine in her purse as opposed to the approximately 3.5 grams of cocaine defendant had in the backseat, and the fact that defendant had the buy money in its entirety in his hand. 4RP 360, 367, 5RP 449-52, 454, 460, 524.

The instant case is also distinguishable from State v. Robinson, 73 Wn. App. 851, 872 P.2d 43 (1994) cited by defendant. In Robinson, the defendant did not know what the co-defendant was doing when he engaged in a robbery. Id. at 852. The defendant panicked after the co-defendant had completed the act and sped off after the co-defendant jumped back in the car. Id. The court found the crime had been completed by the time the co-defendant got back in the car so the defendant could not be an accomplice. Id. at 857. In the instant case, evidence leads to the inference that defendant was integral to the delivery that occurred, even if he did not himself hand the drugs to the CI.

Defendant had the main drug supply, was present while the delivery occurred and ended up with all the profit. 5RP 449-52, 454-5, 458, 460, 563-4. Given the disparity in the amount of drugs found on Banks and found in defendant's control, it is a reasonable inference that Banks received the smaller amount for her role in the delivery. Defendant's actions are distinguishable from the panicked reaction after the fact in Robinson. There was sufficient evidence for the jury to find defendant was a participant in the delivery and to find defendant guilty.

- b. There was sufficient evidence for the jury to find defendant was in constructive possession of the controlled substance through his actions and location.

Possession can be either actual or constructive. Actual possession occurs when defendant is found in actual, physical custody of the drugs. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). In order to establish constructive possession, the jury can look to the totality of the circumstances to determine if the defendant had dominion and control over the drugs. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Dominion and control does not need to be exclusive. State v. Weiss, 73 Wn.2d 372, 375, 438 P.2d 610 (1968). Dominion and control over the premises as well as knowledge of the presence of drugs is enough to establish constructive possession. Id. An automobile is a "premises" for the purpose of determining whether the defendant exercised dominion and

control over the premises where the drugs were found. State v. Potts, 1 Wn. App. 614, 617, 464 P.2d 742 (1969).

In the instant case, the record shows more than just defendant's proximity to the cocaine. Defendant had dominion and control over the backseat where the majority of the drugs were found and had knowledge that the substance was drugs. Defendant was the only person in the backseat of the vehicle. 5RP 428, 469. Defendant was present and seated behind the driver during the delivery and there was evidence that his window was open. 5RP 563-4. Given his proximity to the driver, it is a reasonable inference that defendant was in earshot as the drug delivery occurred. It is reasonable to infer that defendant knew what the substance was. Defendant was the only person who did not comply with the officers orders and was seen with his head down, focusing on something below eye level, with his hands not visible to the officers. 5RP 428-31. When officers searched the car, the cocaine baggies were not simply lying on the seat next to defendant, but were pushed down between the seats. 5RP 454-5, 477. It is reasonable to infer that defendant knew he had drugs and was trying to hide the drugs between the seats. Drug paraphernalia, specifically two pipes that are used to smoke crack cocaine, were found on the backseat next to defendant. 5RP 468. This is a further indication that defendant knew that the substance in the baggies was cocaine. In addition, defendant had all of the buy money in his hands. 5RP 449-52. It is reasonable to infer that defendant is the one who profited from the deal

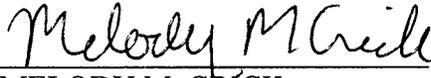
and as such, it is reasonable to infer that he was a participant. There is sufficient evidence for the jury to infer that defendant had dominion and control over the backseat and that he knew that the substance was a controlled substance.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm the conviction below.

DATED: FEBRUARY 26, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date _____ Signature _____

FILED
COURT OF APPEALS
DIVISION II
08 FEB 27 PM 2:09
STATE OF WASHINGTON
BY DEPUTY