

NO. 49757-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEMETRIUS HAYES, APPELLANT

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

No. 15-1-03364-8

Brief of Respondent

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

1. When viewed in the light most favorable to the state, was there sufficient evidence for the jury to find that the defendant possessed cocaine with the intent to deliver?

B. STATEMENT OF THE CASE.

1. Procedure

On August 26, 2016, the State filed an Amended Information charging DEMETRIUS JEROME HAYES, hereinafter “defendant,” with unlawful delivery of a controlled substance, unlawful possession of a controlled substance with intent to deliver, and bail jumping. CP 2-3; RCW 69.50.401(1)(2)(a)-(i); RCW 9A.76.170. Additionally, the defendant was charged with having committed these offenses within 1000 feet of a school bus top, in violation of RCW 69.50.435. CP 2-3.

On September 29, 2016 the case proceeded to jury trial before the Honorable Stephanie A. Arend. CP 71-76. Following the jury trial, the jury returned guilty verdicts on all charges and affirmative special verdicts. CP 71-76. The court sentenced the defendant to 84 months plus 1 day of confinement and 12 months community custody. CP 101-115. Defendant’s notice of appeal was timely. CP 101-16.

2. Facts

Beginning the last week of May through the end of August, 2015, Tacoma Police conducted surveillance of the defendant; the surveillance was directed at the El Hutcho's Bar and Grill parking lot. 2RP¹ 63, 87. The surveillance was directed at the parking lot because of narcotics complaints. 2RP 63. In the parking lot, many brief meetings that concluded with hand-to-hand exchanges occurred, activity consistent with narcotic sales. 2RP 63-64, 11. In fact officers could sometimes see individuals "pour little chunks" into another person's hands in exchange for what appeared to be U.S. currency. *Id.* During this period of surveillance, Detective Betts, one of the lead detectives on the operation, observed the defendant numerous times on numerous days in a 2005 black Jaguar.² 2RP 89. During the entirety of the surveillance, the only person the officers assigned to the operation witnessed driving the vehicle was the defendant. 2RP 114; 3RP 169.

On June 8, 2015, the officers conducted an investigative purchase ("controlled buy") using a confidential informant. 2RP 73-76. Prior to the informant meeting with the defendant, the officers searched the informant to insure he/she had no drugs, weapons, or other contraband on their

¹ The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP-9/22/16; 2RP-9/27/16; 3RP-9/28/16; 4RP-9/29/16; 5RP-10/18/16.

² License plate: ATE 2152. 2RP 95, 124; 3RP 169, 179.

person, the officers found nothing. 2RP 73-74; 3RP 164-65. After the informant was searched and provided with \$40-\$60 of buy money, officers fitted the informant with two video recording devices and dropped the informant off approximately a block away from the El Hutcho's parking lot. 2RP 74, 104; 3RP 165. The officers maintained visual contact with the informant by operating as a team, with members posted in various positions to observe the informant and narrating their observations to the team, and through the use of video surveillance. 2RP 75-76; 3RP 165. The informant made no stops and interacted with no one, except the defendant, from the time he/she left the officers until he/she returned. 2RP 76, 108.

Upon returning to the officers, the informant handed them two rocks of crack cocaine and was no longer in possession of the buy money. 2RP 76; 3RP 167. Video captured by recording devices on informant show an individual, sitting in the driver's seat of a black Jaguar, give to rocks from a small bag to the informant in exchange for money. CP 125-28 (Exhibit 13A, 13B).

After the controlled buy, officers continued surveillance of the parking lot and maintained visual contact with the defendant. 2RP 82. Approximately an hour and a half after the controlled buy, the defendant left the parking lot in the black Jaguar and was later stopped and contacted by patrol officers. 2RP 83, 122. The defendant was the sole occupant of the

vehicle and it was the same vehicle from which the informant purchased the crack cocaine. 2RP 83, 122-23. The defendant was wearing the same clothing as the person seen in the video giving crack cocaine to the informant. *Id.* The defendant was not searched or arrested. 2RP 83, 98.

On August 25, 2015, the defendant was arrested on a warrant following a traffic stop. 2RP 89, 124, 127. No controlled substances or money was found on the defendant's person. *Id.* Following his arrest, officers impounded the vehicle the defendant was driving, a 2005 black Jaguar. 2RP 89; 3RP 178. Officers searched the vehicle the following day after they obtained a warrant. *Id.* In the trunk of the vehicle, officers found 30.1 grams of crack cocaine in a plastic sandwich bag, approximately 40-60 rocks with estimated street value of \$2,400, and a pool cue case with card from the American Billiard's Association in the defendant's name. 2RP 92, 111, 113; 3RP 179-80. A quantity of crack cocaine considered to be normal usage is two to four rocks, and at most seven rocks. 2RP 92, 112. In the front of the vehicle, officers found one rock of crack cocaine on the driver's side floorboard next to the driver's seat. 3RP 179.

During the period of surveillance, the defendant was the only person seen driving the 2005 black Jaguar. 2RP 88, 114; 3RP 169. Defendant parked at the El Hutcho's parking lot many times over the course of surveillance and individuals approached the driver's window; or

approached and sat in the passenger's seat; had brief meetings with the defendant, and the defendant accessed the trunk several times and put objects in and removed objects from the trunk. 2RP 88-89, 93-94; 3RP 168-69.

The defendant was not seen using narcotics and there is no connection between him and any employees at El Hutcho's Bar and Grill. 2RP 111; 3RP 169.

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO FIND THAT THE DEFENDANT POSSESSED COCAINE WITH INTENT TO DELIVER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is 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. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable

inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. *See Camarillo, supra*. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. *See State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

Id. (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Equally reliable circumstantial evidence, direct evidence, or some combination is sufficient to support convictions if it permits rational jurors to find an offense's elements are proved beyond a reasonable doubt. *State v. Moran*, 181 Wn. App. 316, 321, 324 P.3d 808 (2014). Courts defer to juror resolutions of credibility and persuasiveness. *State v. White*, 150 Wn. App. 337, 342, 207 P.3d 1278 (2009); *Wright v. West*, 505 U.S. 277, 296, 112 S. Ct. 2482 (1992). Courts keep in mind the prosecution need not rule out every hypothesis except guilt; when faced with conflicting inferences, courts must presume the jury resolved conflicts in favor of the prosecution, and must defer to that resolution. *Id.* The State's evidence is to be accepted as true with every attending inference. *White*, 150 Wn. App. at 342.

Defendant claims the State failed to adduce sufficient evidence to support he *intended* to deliver the cocaine he possessed.³ Conviction for the offense requires proof that:

1. on or about the 25th day of August, 2015, the defendant possessed a controlled substance, cocaine;
2. the defendant possessed the substance with intent to deliver a controlled substance, cocaine; and
3. it occurred in the State of Washington.

CP 44-70 (Instruction No. 13); *see also* RCW 69.50.40(1)(2)(a)-(i); *State v. Thomas*, 68 Wn. App. 268, 273–74, 843 P.2d 540, 543–44 (1992). The jury was instructed on meaning of intent: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 44-70 (Instruction No. 11).

There is ample evidence to support the jury’s conclusion defendant intended to deliver the cocaine he possessed. Defendant, over a three month period, frequented a parking lot known for narcotics activity, engaged in behavior consistent with narcotics sales, and sold crack

³ The defendant does not challenge the sufficiency of the evidence regarding any other elements of possession with intent to deliver. While the defendant in his assignment of error states, “There was insufficient evidence that appellant possessed a controlled substance with intent to deliver” the defendant presents no authority or argument regarding any element except intent. Brief of Appellant, pages 5-10. Arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant)); RAP 10.3(a). To the extent that the defendant has raised a challenge to any other element possession with intent to deliver, such a claim should not be considered.

cocaine to a police informant. 2RP 63-64, 73-76, 87, 89, 111; 3RP 167. Many meetings occurred at the parking lot which were consistent with narcotics sales, essentially making it an open-air drug market where sellers would setup shop knowing there would be customers. The defendant frequently parked there, where individuals would engage the defendant in brief encounters by approaching the driver's window or sitting in the passenger's seat. 2RP 93. This is the same activity that is seen in the footage captured by the recording devices fitted to the informant during the controlled buy on June 8, 2015, where the defendant sold two rocks of crack cocaine to the informant. CP 125-28 (Exhibit 13A, 13B). This evidence establishes that the defendant was regularly present at an open-air drug market and delivered cocaine in exchange for money.

The defendant now asserts there is a lack of substantial corroborating evidence that the defendant intended to deliver the cocaine he possessed. BOA, page 10. In the light most favorable to the State, the defendant *did* intend to deliver the cocaine he possessed in the vehicle. The defendant acted as any business owner who operated out of an open-air market would. The defendant would arrived at the market with his wares – cocaine – and would setup his store front, in this case the front of his car. He kept a small quantity of inventory available for immediate sale in the front of his car and his remaining inventory was safely stored in

another location, here it was the trunk of the black Jaguar. When inventory was exhausted or running low in the storefront, the defendant went to the trunk to restock and deposit money.

Narcotic sales is an inherently dangerous activity and the defendant behaved as any business owner would who wanted to protect his or her business. By keeping only a small quantity in the front of the car and a large quantity in the trunk, the defendant was able to reduce losses in the event of a robbery. The same reason store owners keep a small amount of cash in the register and larger amounts in a safe, and remove cash from the safe as they need it. They take this precaution, as the defendant did, because robbers want to execute their robberies as quickly as possible to avoid attention and possible capture by law enforcement. All of the evidence, as argued above, supports the jury's finding that the defendant intended to deliver the cocaine he possessed in the trunk.

On appeal, defendant argues against the sufficiency of evidence by improperly drawing inferences from the evidence in favor of his theory of the case despite the jury's implicit rejection of it at trial. Defendant inaccurately presents his case as "naked possession" of drugs in an attempt to draw comparisons to *State v. Brown*, 68 Wn. App. 480, 484-85, 843 P.2d 1098, 1101 (1993). Defendant repeatedly references the lack of scales, individual packaging, and money relying on these factors as an

exhaustive list that *must* be present to infer intent to deliver. BOA, pages 6-9.

This case is distinguishable from *Brown*, 68 Wn. App. 480 at 484-85. In *Brown*, the court found the lack of scales, individual packaging, and money was insufficient to establish intent to deliver. While the defendant in *Brown* was in a “high narcotics area” he was around the corner from his home, the court found this to be insufficient to establish intent. *Id.* However, the court also noted in making its decision, there was no officer observation of activity suggesting sales or delivery of a controlled substance, *Id.* In contrast, here, we have officer observation over a three month period, video of defendant selling crack cocaine, and the defendant was in a “high narcotics area” for which there was no innocent explanation of why he was there.

The case at bar is analogous to *State v. Thomas*, 68 Wn. App. 268, 843 P.2d 540, 543–44 (1992). In *Thomas*, officers observed the defendant selling drugs in three separate incidents before he was arrested. *Thomas*, 68 Wn. App. 268 at 540-44. Here, officers observed the defendant engage in activities consistent with narcotics sales, supported by the fact he sold crack cocaine to an informant during a controlled buy. The court in *Thomas*, held officers’ observations of the defendant selling drugs prior to his arrest logically related to the material issue of what he intended to do

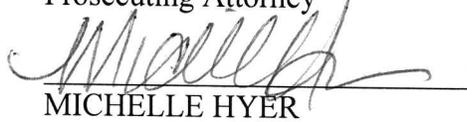
with the cocaine he possessed, and that it provided the jury with sufficient evidence to infer what the defendant intended to do with the cocaine in his possession. *Id*; see also ***State v. Hubbard***, 27 Wn. App. 61, 64, 615 P.2d 1325 (1980) (evidence of defendant's prior drug sales from six years earlier was relevant to rebut his denial of an intent to sell a controlled substance); ***State v. Hernandez***, 85 Wn. App. 672, 674–75, 935 P.2d 623, 625 (1997) (court found sufficient evidence of possession with intent to deliver based on officer testimony about drugs and drug-sale behavior; observation of behavior consistent with drug sales; known drug areas in which the defendant was observed; defendant's possession of materials consistent with those previously delivered). When examined in the light most favorable to the State, the evidence shows that the defendant possessed cocaine with the intent to deliver, as found by the jury, and thus the court should affirm.

D. CONCLUSION.

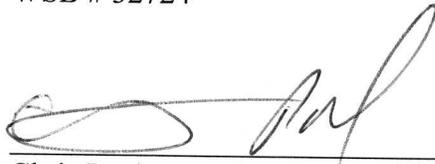
For the above stated reasons, the State respectfully requests that this court affirm the defendant's conviction below.

DATED: June 27, 2017

MARK LINDQUIST
Pierce County
Prosecuting Attorney



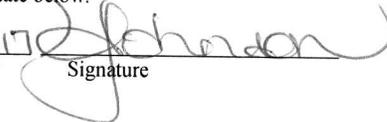
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Chris Paul
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Certificate of Service:

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.

6/27/17 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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