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Court of Appeals
Division II
State of Washington
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NO. 51914-3-II

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

STATE OF WASHINGTON, Respondent

v.

TAMARA MICHELE AVERY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00693-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. Possession with intent to deliver drugs requires possession, plus at least one other supporting piece of evidence. Here, numerous additional pieces of evidence supported an inference of intent to deliver.

II. The State concedes that the filing fee should not have been imposed and that the case should be remanded to the trial court for a determination of Defendant's future ability to pay legal financial obligations.

STATEMENT OF THE CASE

On January 28, 2016, three agents and one supervisor from the Drug Enforcement Administration (DEA) served a search warrant on the defendant's residence, automobile, and cell phones for evidence of methamphetamine distribution. RP 140-143, 184-187. In the hours prior to service of the search warrant, one or more DEA agents maintained surveillance on the defendant's residence. RP 186. Just prior to service of the warrant, DEA agents watched the defendant walk from her residence to her car, put a purse in the front seat, close the vehicle door, and return to her residence. RP 140-143, 186-188. The defendant was taken into custody, and the DEA agents searched the vehicle. *Id.* The keys to that vehicle were found on her person. RP 190.

Inside the purse the defendant had been seen carrying to her vehicle, DEA agents found an HTC smart phone, a quantity of small,

clean, unused Ziploc baggies, and a locked black money bag secured by a combination lock. RP 143, 193, 197. The combination was obtained from the defendant. RP 197. Inside the locked bag, DEA agents found two plastic baggies, containing 3 and 3.4 grams of methamphetamine. Also found in the same locked bag were four baggies with smaller amounts of methamphetamine in them. RP 198-200, 212-215, 418-19. One of the bags had been marked with the number "3," which happened to be the number of grams of methamphetamine contained in the baggie. RP 212. DEA Agent Riley testified methamphetamine dealers often mark baggies with corresponding numbers / weights to keep track of baggies that have been weighed and packaged for sale. RP 213. He also testified that the amounts corresponded to a common sale amount of methamphetamine—an "8-Ball" or 1/8 of an ounce. RP 214. He testified these amounts corresponded to approximately 30 typical uses of methamphetamine each. RP 214.

In the defendant's apartment, DEA agents found two mobile phones (a smart phone on the table and a Samsung flip phone in the defendant's hand) RP 190, 194. They also found, on the kitchen table, an electronic scale that had possibly been left turned on. RP 190, 198.

The DEA performed a review / forensic analysis of the text messages found on that Samsung flip phone that the defendant held in her

hand. RP 217-18. The text messages found on defendant's mobile phone were all from the 24-hour period prior to the defendant's arrest and service of the search warrant. RP 257-58. DEA Agent Riley testified that it is very common for cell phones to be used for buying and selling illegal drugs. RP 178. He also testified that it is very common for drug dealers to use multiple cell phones in an effort to evade law enforcement detection. RP 178-79. DEA Agent Riley testified that drug dealers regularly use "burner phones"—cheap phones that a drug dealer will use for a short amount of time then discard. These phones are often flip phones and pre-paid phones. RP 179-180.

DEA Agent Riley testified that it was uncommon for participants in a drug transaction to refer to the drugs directly. Instead, participants in a drug transaction are generally vague or use code words. RP 181.

Several text messages found on that Samsung "burner phone" between the defendant and other parties were admitted as evidence. RP 263-267. These included: "I have more." RP 263. "I am in need." RP 264. "Call me now pretty please. Need you bad. LOL. J." RP 264. DEA Agent Riley testified that it is common for "drug sick" individuals to be in need of drugs to combat their withdrawal symptoms. RP 177-78.

Other text messages admitted as evidence included: "Getting a lot of complaints about the last and not sure on new. I don't like." RP 265.

"This last isn't. It's not the same because I looked at them under the black light. If it is not—if it is, it's not stable and shelf life." RP 267. "Come look at it with me and bring more if you have—if you have so we can take a look." RP 267. Detective Hall, formerly of the Clark-Vancouver Regional Drug Task Force, testified that adulterants are commonly added to methamphetamine and that these adulterants affect both the purity and appearance of the drug. RP 387-88.

Additional text messages included as evidence included: "Depends on how m any they buy and who's selling them. Six to ten a piece." RP 269. "Do you have some you're getting rid of?" RP 270. "I was thinking three to her and .5 to you." RP 271. She's getting 8 to 10 a piece for them." RP 273. DEA Agent Riley testified these text messages were consistent with drug transactions in his experience, consistent with a dealer giving a portion of the delivered drugs to the person who brokered the deal, and that numbers are commonly shortened so that "8 to 10 a piece" was likely a reference to $80 to $100. RP 269-273.

Detective Hall, formerly of the Clark-Vancouver Regional Drug Task Force, also testified that the six baggies of methamphetamine found in the defendant's possession were not typical for personal use and that the total quantities possessed were also not typical for personal use. RP 395-

96. He also testified that the defendant's claimed methamphetamine usage would have cost her $2000 or more per month. RP 536, 553.

The defendant testified that during the time period leading up to her arrest she was on social security disability. RP 534. The defendant testified she possessed the methamphetamine in question. RP 535. The defendant, when confronted by the text message reading, "3 grams to her and a half gram for you for doing it" and asked if those messages referred to her dealing methamphetamine, testified, "I'm not sure" and "It could have been for weed [marijuana], yes." RP 536-37.

ARGUMENT

I. Possession with intent to deliver drugs requires possession, plus at least one other supporting piece of evidence. Here, numerous additional pieces of evidence supported an inference of intent to deliver.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found 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 ...." *Salinas*, 119 Wn.2d at 201. All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201.

Mere possession of drugs, without more, does not raise an inference of the defendant's intent to deliver a controlled substance. *State v. Reichert*, 158 Wn. App. 374, 391, 242 P.3d 44 (2010). The State must prove possession of drugs and at least one additional factor that indicates an intent to deliver in order to convict a defendant of unlawful possession of a controlled substance with intent to deliver. *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004).

Specific intent can be inferred as a logical probability from all the facts and circumstances. *State v. Davis*, 79 Wn. App. 591, 594, 904 P.2d 306 (1995). Circumstantial and direct evidence are to be considered equally reliable by the reviewing court in determining the sufficiency of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Additional facts to support an inference of an intent to deliver a controlled substance may include substantial amounts of cash, scales, cell phones, address books, baggies, and materials used to manufacture narcotics. *See State v. Zunker*, 112 Wn. App. 130, 136, 48 P.3d 344 (2002).

The evidence in this case consists of several pieces of evidence beyond the quantity of drugs possessed that support an inference of intent:

> 1. A digital scale was found on defendant's kitchen table. This was immediately after the defendant had taken the bag containing clean Ziploc baggies and multiple baggies of methamphetamine to her car. This is consistent with someone having just used the scale to measure out

quantities of methamphetamine for sale. It is not consistent with someone who is just a purchaser of methamphetamine.

2. The defendant took baggies of methamphetamine packaged in common sale-sized amounts to her vehicle. The total amount was inconsistent with personal use.

3. The defendant possessed multiple baggies of methamphetamine. The total amount of baggies was inconsistent with personal use.

4. The defendant had numerous clean baggies of the sort commonly used for packaging methamphetamine for sale. This was also inconsistent with personal use.

5. The defendant had a "burner phone" devoid of personal messages, and separate from her personal mobile phone, containing text messages that appeared to reference only drug transactions.

6. The defendant stated she had a $2000 per month drug habit and no explicable source of income, that would support that amount of drug purchases. This supports an inference of drug dealing to pay for the $2000 per month in drug purchases.

7. The text messages found on the "burner phone" referred to amounts and prices consistent with the sale of methamphetamine but scrupulously avoided any mention of the item for sale.

8. The defendant, when confronted with a text message which implied dealing in methamphetamine indicated she was unsure if it referenced methamphetamine, or possibly marijuana.

Numerous cases have held that evidence of possession with intent to deliver is sufficient with a lesser quantity of evidence. *State v. McPherson*, 111 Wn.App. 747, 46 P.3d 284 (2002)(2 grams meth.,

electronic scales, $80 cash, apparent drug notes); *State v. Campos*, 100 Wn.App. 218, 998 P.2d 893 (2000)(2 grams cocaine, $1912 cash); *State v. Slighte*, 157Wn.App. 618, 238 P.3d 83 (2010)(multiple baggies with residue, clean baggies, digital scale); *State v. Canning*, 2019 WL 581714, Slip Op. 50160-1-II (February 13, 2019) (3 baggies of meth. weighing 1 gram, 5.2 grams, and 6.8 grams); *State v. Fehr*, 185 Wn.App. 1031, Slip Op. 44646-4-II (January 21, 2015)(2 baggies of meth. weighing 1 gram and 5.1 grams)[1] Because specific intent can be inferred as a logical probability from all of the facts and circumstances of this case, the circumstantial evidence produced by the State allowed for a reasonable inference that Avery had the intent to deliver a controlled substance. In a challenge to the sufficiency of the evidence, all facts and reasonable inferences are viewed in favor of the State. Any rational trier of fact could have found that Avery had the intent to deliver the methamphetamine in her possession. Because the evidence was sufficient, the State proved the essential elements of the crime beyond a reasonable doubt.

II. The State concedes that the filing fee should not have been imposed and that the case should be remanded to the trial court for a determination of Defendant's future ability to pay legal financial obligations.

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[1] *State v. Canning* and *State v. Fehr* are unpublished opinions of this court. GR 14.1(a) states that "unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate."

CONCLUSION

Not just one, but numerous pieces of additional evidence support a finding of possession with intent to deliver methamphetamine. The verdict of the jury should be affirmed.

The filing fee imposed in this case should be vacated due to the defendant's indigency and the case remanded to the trial court for a determination of her future ability to pay legal financial obligations.

DATED this 27 day of February, 2019.

Respectfully submitted:

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