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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT ALAN WOLFE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01642-18

BRIEF OF RESPONDENT

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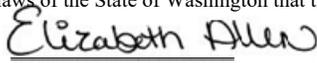
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the search warrant was supported by probable cause?
2. Whether, taken in a light most favorable to the state, there was sufficient evidence to prove bail jumping beyond a reasonable doubt?
3. Whether there was instructional error in instructing the jury that the state must prove Wolfe's knowledge the requirement of a subsequent personal appearance in court?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Robert Alan Wolfe was charged by information filed in Kitsap County Superior Court with maintaining premises or vehicle for using controlled substance (RCW 69.50.402(1)(f)) ("maintaining premises"). CP 1-7. Later, a first amended information charged maintaining premises, possession of controlled substance [methamphetamine], possession of controlled substance [heroin], and bail jumping. CP 42-44.

Wolfe failed to appear for a scheduled omnibus hearing and a bench warrant was issued. CP 8; RP, 1/19-25/18, 3.¹ Several days later,

¹ The verbatim report of proceedings for trial of the case are in three volumes and are referred to as 1RP, 2RP, and 3RP. Other proceedings are referred to by the date of the transcript.

Wolfe appeared and moved to quash the warrant. RP, 1/19-25-18, 5. That motion was granted. Id.

Pretrial, Wolfe asserted a motion to suppress evidence pursuant to CrR 3.6. CP 9. The search warrant complaint is in the record as attachment to the state's responsive brief. CP 23-32. The motion was heard without testimony. The trial court orally denied the motion. RP, 5/7/18, 9. The trial court entered Findings of Fact and Conclusions of Law for Hearing on CrR 3.6 ("findings and conclusions"). CP 66-69. The facts contained in the search warrant application are addressed in the argument section below

The jury found Wolfe guilty on all four counts. CP 96-97. Wolfe was sentenced within the standard range to 12 months and 1 day. CP 100. Wolfe timely filed his notice of appeal. CP 109.

B. FACTS

Police became aware of Wolf's home by way of a citizen complaint. 2RP 196. The citizen, Tim Calnan, owned two properties across the street from Wolf's house. 2RP 198.

Upon contact with Mr. Calnan, police observed on Mr. Calnan's property syringes with orange caps that were "consistent with IV drug use." 2RP 199. Police research revealed that Wolf's driver's license listed the house in question as his residence. 2RP 202.

Police proceeded to conduct surveillance of the home. 2RP 203. From an upstairs window in Mr. Calnan's house, police observed eight different people enter, leave, or "lurking in the driveway" during a ten-minute time-span. 2RP 203.

More research led police to seek a search warrant for Wolf's house. 2RP 204. On service of the warrant, the police found 13 people at the house. 2RP 205. These people were taken outside and the house was searched. *Id.* In the house the police saw "basically hundreds" of items "basically being tools for using controlled substances." 2RP 214. The items included syringes, foil with burn marks, empty 100-count syringe boxes, hazardous waste containers (for used syringes, 2RP 219-20), pipes used to smoke methamphetamine, and "bongs." 2RP 214. Police explained that the foil with burn marks is consistent with the smoking of heroin. 2RP 216. Glass "bongs" are consistent with smoking methamphetamine. *Id.*

One officer described the interior of the house as a mess. 2RP 286. He observed used and unused needles "everywhere in all rooms." *Id.* He saw foil with burn marks "throughout the house." *Id.*

In one room, police found a plastic container. 2RP 246. The container contained what was described as a "drug kit," including syringes, a mall tin used as a "cooker" with brown residue in it. 2RP 247.

Police opined that these items were consistent with the use of drug paraphernalia. Id.

In Wolf's room, police found items that are used for drug use and items used to weigh and store drugs. 2RP 262. Items included a glass smoking device, a digital scale, and a clear plastic bag containing a white, crystalline substance that police suspected to be methamphetamine. 2RP 263. A storage container found in the room contained a "brownish-sticky-like substance" that police presumed at that time to be heroin. 2RP 264. Wolf's identification was also found in that room. 2RP 266. Under the mattress on the bed, police found pieces of foil, cigarette butts, and a hypodermic needle. 2RP 268.

In another bedroom, police found a box of hypodermic needles and a garbage can with used needles. 2RP 269. Here also police found tinfoil pieces under the mattress. 2RP 271. In this room, police found vials of Narcan, used to counteract overdoses of heroin. Id.

Police spoke with Wolfe when the warrant was served. 2RP 225. Wolf advised that his mother had moved out of the house eight months before the day of the warrant service. Id. Wolf was renting the house to "multiple people" for a couple hundred dollars each. Id. Wolf admitted that he had seen someone smoking heroin in the house several days before. 2RP 226.

III. ARGUMENT

A. THE REPORT OF IDENTIFIED CITIZENS, THE NEIGHBOR AND HIS WORKERS, COUPLED WITH THE CORROBORATING OBSERVATIONS OF LAW ENFORCEMENT PROVIDED PROBABLE CAUSE FOR THE ISSUANCE OF THE WARRANT.

Wolfe argues that the trial court erred in upholding the search warrant for Wolf's residence. He claims that the search warrant issued without a sufficient finding of probable cause. This claim is without merit because all the information in the warrant application taken together, and reasonable inferences therefrom, establish probable cause to issue the warrant.

On review of the issuance of a search warrant, an issuing magistrate is accorded "great deference" and the standard of review is abuse of discretion. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (En Banc). But the trial court's assessment of probable cause is a legal conclusion subject to de novo review. 165 Wn.2d at 182. This inquiry considers the whole of the information provided to the issuing magistrate. *State v. Dunn*, 186 Wn. App. 889, 896, 348 P.3d 791 *review denied* 184 Wn.2d 1004 (2015). The magistrate is allowed to make reasonable inferences from the facts and circumstances alleged. *Id.*

The issuance of a search warrant requires that the application show

probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause must be established by facts that are sufficient to allow a reasonable person to conclude that there is a probability of criminal activity. *See State v. Gentry*, 125 Wn.2d 570, 607, 888P.2d 1105 (1995). An affidavit for a search warrant should be evaluated in common sense manner, not hypertechnically, and any doubts are resolved in favor of the warrant. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003 (En Banc)). But the affidavit must be based on more than mere suspicion or personal belief. 150 Wn.2d at 265. There must be a nexus between the crime alleged and the items to be seized and between the items to be seized and the place searched. *Neth*, 165 Wn.2d at 183 *citing Thein*, 138 Wn.2d at 140.

Probable cause based upon information provided by other than the police must include demonstration of the informant's basis of knowledge and reliability. *See State v. Olson*, 73 Wn. App. 348, 355, 869 P.2d 110 *review denied* 124 Wn.2d 1029 (1994). The *Aguilar-Spinelli*² test requires that information provided must be credible and must establish how the person obtained the information. 73 Wn. App. at 355. A tip that

² *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v.*

is alone insufficient to support probable cause may be corroborated by independent police investigation and thereby establish probable cause. *Id.* That corroboration must point to criminal activity “along the lines suggested by the informant” and not merely corroborate innocuous facts. *Id.* For example, in *Olson*, the informant’s tip did not meet the *Aguilar-Spinelli* test but investigation revealed increased power usage, which alone would not support probable cause but did supply additional evidence to the issuing magistrate that corroborated the tip and thereby established probable cause. 73 Wn. App. at 356; *See also State v. Dunn*, 186 Wn. App. at 897 (“Facts that would not support probable cause when standing alone can support probable cause when viewed together with other facts.”).

When the person providing information to the police is an identified ordinary citizen, “the necessary showing of credibility is relaxed.” *State v. Rodriguez*, 53 Wn. App. 571, 574, 769 P.2d 309 (1989) *citing State v. Northness*, 20 Wn. App. 551, 556, 582 P.2d 546 (1978). In *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986), a neighbor added to other evidence in complaining that there was frequent foot traffic at the subject residence. 107 Wn.2d at 8. The *Kennedy* Court said “The neighbors' information does not require a showing of the same degree of

Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

reliability as the informant's tip since it comes from 'citizen' rather than 'professional' informants." Id.

Here, the crime alleged was "VUCSA-Maintaining Place/Swelling For Selling/User Of A Controlled Substance RCW 69.50.402.1.F." CP 23.

The statute provides that it is unlawful to

(f) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

RCW 69.50.402(1)(f). Proof of the crime requires "more than a single incident of illegal drug activity." *State v. Menard*, 197 Wn. App. 901, 905, 392 P.3d 1105 (2017) review denied 189 Wn.2d 1005 (2017), citing *State v. Ceglowski*, 103 Wn. App. 346, 350, 12 P.3d 160 (2000). To "maintain" a drug house connotes continuing conduct. 197 Wn. App. at 905. To prove the crime, there must be "(1) some evidence that the drug activity is of a continuing and recurring character; and (2) that a substantial purpose of maintaining the premises is for the illegal drug activity." *Ceglowski*, 103 Wn. App. at 352-53.

The items to be seized, per the search warrant complaint, are heroin, drug paraphernalia, and dominion and control evidence for the residence and the "various rooms" in the residence. CP 32. The place to be searched is the residence where there is cause to believe these items

will be found. This case may be seen as asking whether or not the cause to believe that those items are located in that residence is reasonable and amounts to adequate probable cause to support the warrant.

The Complaint for Search Warrant may be broken down as follows

--the residence is legally identified and associated with defendant Wolfe (CP 23-25);

--police received a complaint was received from an identified neighbor of Wolfe, Tim Calnan, noting constant traffic in people going in and out of the residence for short stays and noting that the front door is left open so the visitors enter without knocking; the identified neighbor reported that workers on his property had noticed a high level of traffic in and out of the house and Mr. Calnan noted that other neighbors were tired of all the traffic and it made them nervous (CP 25-26); Mr. Calnan advised that he had observed the in and out traffic over the previous couple of months (CP 27); Mr. Calnan said that cars visiting the residence would park in front of his property and he showed the police syringes and syringe caps on the ground in that area (CP 27);

--workers on Calnan's property, also identified in the affidavit, had observed consistent going and coming for three days with the parade of individuals starting around 7 a.m.; this worker had counted as many as 12 different visitors in a ½ hour time-period (CP 27-28);

--that several years before there had been complaints of narcotics activity at the same residence (CP 26);

--that several months before the application (October 23, 2017), in June of 2017, another officer was investigating a vehicle prowler case and was told that the suspect lived at the residence and that upon going there to find the suspect, the police discovered and arrested one Corbin Egeler on a warrant and the police are aware that Egeler is "associated with the local heroin crowd" (CP 26-27);

--that the affiant observed people at the residence that he knew to be associated with drug use, including the above mentioned vehicle prowler suspect who, researched revealed, had "at least 4 convictions for VUCSA related offenses" (CP 28);

--that another officer had spoken to a known drug user, Cynthia Sylvester, who said that there were drug rip-offs and heroin sales at the residence (CP 28-29);

--that another known drug user, Corey Butler, was investigated at a nearby market, was found to be in possession of syringes and admitted that he uses heroin and nodded toward the residence when asked about drug use at the house (CP 29);

--that two people alighted a car and walked past an officer on their way to

the residence and when the officer looked in their car, he observed a piece of tin foil with burnt residue consistent with smoking heroin (CP 30);

--that nearly a month later (9/21-10/17/17) Mr. Calnan reported that the foot traffic had not slowed down with multiple cars coming and going and fresh syringes found on his property, including in a shed on his property (CP 31-32).

One way to look at these facts is to excise statements made by other than identified, noncriminal citizen informants. Then, we have an identified citizen and neighbor, Mr. Calnan, reporting heavy in and out traffic for an extended period of time. Mr. Calnan reported vehicular traffic associated with the house and pointed out drug paraphernalia, syringes, on the ground where these vehicles park. That there was heavy foot-traffic is corroborated by workers on Mr. Calnan's property; the workers being identified citizen informants also. Police observations corroborate the heavy traffic. Police experience is applied in that those investigating recognize people associated with the residence as drug users. Police observe drug paraphernalia, burnt tin foil, in plain view in a car the occupants of which are associated with the residence.

Without resort to what any of the known drug dealers had to say, even though hearsay is admissible in a warrant application, these facts provide probable cause. Whether or not a particular person identified as a

drug user told the police the truth is beside the point. That is, the point of the listing of these known drug users is that they were all associated with a residence suspected of being a place where these drug users go to use drugs.

Wolfe's seriatim approach to warrant application ignores that the issuing magistrate is to consider the submission as a whole. The unassailable reporter, Mr. Calnan, told the police what he had observed and in fact showed the police physical evidence in the form of syringes on the ground. The combination of the information of the identified citizen informants and the corroboration done by the police provided the issuing magistrate sufficient information to reasonably infer that there was probable cause for the search. The trial court properly denied Wolfe's motion to suppress.

B. THE CIRCUMSTANCES OF THE RECORD ALLOW A REASONABLE INFERENCE THAT WOLFE HAD KNOWLEDGE OF THE COURT DATE THAT HE MISSED.

Wolfe next claims that his bail jumping conviction is not supported by sufficient evidence. This claim is without merit because under the facts of the case a trier of fact can reasonably infer from the circumstances that Wolfe had knowledge of his next court date.

In reviewing the sufficiency of the evidence, an appellate court

examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution’s evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving “conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969).

Next, Wolfe ignores the mental state involved in the crime of bail jumping—knowledge. Implicit in Wolfe’s argument is the notion that the state needed to present direct proof that his attorney handed him a piece of paper. To the contrary, “[i]n order to meet the knowledge requirement of the [bail jumping] statute, the State is required to prove that a defendant

has been given notice of the required court dates.” *State v. Boyd*, 1 Wn. App.2d 501, 516, 408 p.3d 362 (2017) *review denied* 190 Wn.2d 1008 (2018). The third element of the to convict instruction provides “that the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before the court.” CP 92 (instruction no. 20). The element does not require proof of a written court order.

The jury was instructed on the definition of knowledge

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstances, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 80 (instruction no. 8). This instruction is found at WPIC 10.02. 11 Wash. Prac., Pattern Jury Instr. Crim., 4th Ed. In order to convict Wolfe, the state had to prove beyond a reasonable doubt that Wolfe “knew, or was aware that he was required to appear.” *State v. Bryant*, 89 Wn. App. 857, 870, 950 P.2d 1004 (1998) *review denied* 137 Wn.2d 1017 (1999).

Third, Wolf ignores the principle that circumstantial evidence may prove an element. The jury was instructed that

the law does not distinguish between direct and circumstantial

evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

CP 77 (instruction no. 5). Circumstantial evidence may prove an intent element: “Specific criminal intent may be inferred from circumstantial evidence or from a defendant's conduct, where the requisite intent is plainly indicated as a matter of logical probability.” *Bryant*, 89 Wn. App. at 871. A “jury is *permitted* to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists.” 89 Wn. App. at 873.

The circumstances here, taken in a light most favorable to the state, show that Wolfe was standing next to his own attorney when that attorney announced the next court date out-loud in open court. Nearly immediately after the attorney's statement, the trial court ordered that the dates announced by counsel were the dates that the trial court was setting.

This jury had evidence that Wolfe was then present in court in the company of his attorney. The circumstances leave no doubt that it can be reasonably inferred that Wolfe heard his attorney say that the next court date, a reset of his omnibus hearing. Moreover, there is evidence that the written order was handed to the defense while Wolfe stood just there at the bar of the court. Exhibit 61. Moreover, any reasonable person in Wolfe's position would know that since the matter was not dismissed, there would

be another court date. The circumstances would allow any trier of fact to reasonably infer that Wolfe had “information that would lead a reasonable person in the same situation to believe that a fact exists.” The evidence was sufficient.

C. THE JURY WAS PROPERLY INSTRUCTED ON THE KNOWLEDGE ELEMENT OF THE CASE.

Wolfe next claims that the to-convict instruction relieved the state of proving every element of the charge by failing to advise the jury that the state must show that he had notice of the date. This claim is without merit because the jury was properly instructed that the state was required to prove beyond a reasonable doubt that Wolfe had knowledge of the court date and failed to appear.

A to-convict instruction must contain all the elements of a crime. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Failure to instruct on an essential element is reversible error. *State v. Pope*, 100 Wash.App. 624, 628, 999 P.2d 51 (2000). A challenge to a to-convict instruction is reviewed de novo. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

The elements of bail jumping were described to the jury³

³ The numbers in the brackets “[**]” are provided; the trial court’s instruction renumbered the elements by hand.

To convict the defendant of the crime of Bail Jumping as charged in Count [IV] each of the following elements of the crime must be proved beyond a reasonable doubt-

[1] That on or about January 19, 2018, the defendant failed to appear before a court;

[2] That the defendant was charged with a class B or C felony;

[3] That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and

[4] That these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 92 (instruction no. 20); RCW 9A.76.170; WPIC 120.41.

First, neither the statute nor the to-convict instruction says or addresses Wolfe's supposed element that requires that he be "given notice." Brief at 32. The language is that he was released "with knowledge" that he was required to subsequently appear. A requirement that a judge or someone else give notice changes the focus of the element from Wolfe's knowledge to requiring that someone else failed to perform a necessary task. If written notice was or is required, the legislature would have so provided. Certainly, receipt of a piece of paper with the next court date written on it would be strong evidence of knowledge. But hearing his own attorney say the date in open court with Wolfe standing next to her nearly equally fills the bill.

And, again, in arguing the meaning of “as required” and in assailing *State v. Hart*, 195 Wn. App. 449, 381 P.3d 142 (2016) *review denied* 187 Wn.2d 1011 (2017), Wolfe asserts the nonexistent element that the state must prove beyond a reasonable doubt that he was “given notice.” Brief at 35. Neither the statute nor the to-convict instruction require the state to prove “that the accused received notice of the actual hearing that s/he allegedly missed.” Brief at 36. That is, the statute nowhere requires written notice. Again, what is required is proof, by direct or circumstantial evidence, that Wolfe knew he had a court date.

This Court considered this statute in *State v. Hart*, 195 Wn. App. 449, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011 (2017). Hart challenged the sufficiency of evidence on his bail jumping conviction. 195 Wn. App. at 457. He argued that the state failed to prove beyond a reasonable doubt that he had failed to appear “at the required specific time.” *Id.* Hart relied on *Coleman* a case where a conviction had been reversed because the evidence showed that the defendant had been held to have failed to appear at 8:30 a.m. when he had been ordered to appear at 9:00 a.m. *Id.* (*arguing State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010)). *Coleman* was distinguished by the *Hart* Court as it affirmed Hart’s conviction:

Unlike in *Coleman*, where the evidence established that the defendant had failed to appear before the time he was ordered to do

so, here the jury could reasonably infer that Hart failed to appear at the time specified in his order based on Myklebust's testimony that Hart did not appear for his September 9 hearing, together with the clerk's minute entry showing that Hart failed to appear at that hearing and that the prosecutor had requested a bench warrant based on Hart's absence from the hearing.

155 Wn. App. at 458.

The *Hart* Court was true to the statutory language, which, as noted, requires proof of knowledge without reference to how the defendant got that knowledge. Under the plain language involved, the “as required” language is merely a reference to “the requirement of a subsequent personal appearance.” There is no more to it than that; it is completely unclear what else would fill the bill of “as required” other than making the required subsequent appearance.

The state’s burden was to show that Wolfe had knowledge of his court date. This is precisely how the jury was instructed. There is no error in the jury instruction.

IV. CONCLUSION

For the foregoing reasons, Wolfe's conviction and sentence should be affirmed.

DATED April 8, 2019.

Respectfully submitted,

Chad M. Enright

KITSAP COUNTY PROSECUTOR

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A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

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