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NO. 53370-7-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

VICTOR W. SPRAGUE,

Petitioner.

RESPONDENT'S BRIEF

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err when it denied Sprague's motion for a continuance on the morning of trial.
2. The trial court correctly denied Sprague's motion to dismiss as sufficient independent evidence corroborated Sprague's incriminating statements such that *corpus delicti* was established.
3. Sufficient evidence supported Sprague's conviction for possession of methamphetamine with intent to deliver.
4. Trial counsel was not ineffective because she had the opportunity to advise Sprague regarding the potential for new charges, and Sprague fails to show prejudice as the outcome of the trial would not have changed.
5. There was no cumulative error in this case.

II. STATEMENT OF THE CASE

On November 14, 2018, Longview Police served a signed and valid search warrant at 1219 Commerce Avenue #2 in Longview, Washington. The warrant allowed for the search of Victor Sprague and his apartment for illegal drugs and related contraband. RP 95–96, 113–114. Sprague was present in the apartment when officers arrived. RP 98.

When officers searched the apartment, they located two baggies of methamphetamine with a combined weight of just over 10 grams, a scale with methamphetamine residue on it, a used methamphetamine pipe, other items with methamphetamine on them, and multiple plastic grocery bags. RP 128–130, 115, 140. Sprague told officers that he both used and sold

methamphetamine, and that he used the plastic grocery bags to package drugs for sales. RP 99–100, 114–115.

Sprague was charged with possession with intent to deliver with a school bus stop enhancement. CP 4. At trial, the State's witnesses testified regarding the differences between a user amount and a dealer amount of methamphetamine, indicating that three or three and a half grams and up is indicative of a dealer amount. RP 125. The State's witnesses also testified that it is very common for drug sellers in this area to tear off pieces of plastic grocery bags, put the drugs inside, and either burn or tie the bag closed. RP 95, 139.

The jury found Sprague guilty of possession of methamphetamine with intent to deliver within 1000 of a school bus stop. CP 92, CP 94. He was sentenced to 65 months on the underlying charge plus 24 months for the school bus stop enhancement. CP 96–109. He now timely appeals.

III. ARGUMENT

A. The trial court did not err when it denied Sprague's motion for a continuance on the morning of trial.

A decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court and is reviewed for abuse of discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

A reviewing court may not disturb a trial court's decision unless the

appellant makes a clear showing that the trial court's discretion was based on untenable grounds or made for untenable reasons. *Id.* Additionally, the denial of a continuance will be reversed "only on a showing that the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied." *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994). Sprague has not shown that the trial court's denial of his motion for a continuance was based on untenable grounds or that he was prejudiced by the denial.

The prosecutor in this case was told the afternoon prior to trial that police had conducted a controlled buy from Sprague prior to the case at bar, and she informed the defense attorney on the morning of trial. RP 29. The prosecutor informed defense counsel that she would not file the charge for the controlled buy if Sprague entered a guilty plea to the possession with intent charge that morning. There was no evidence from the controlled buy that would be admissible in the possession with intent trial, and no intent by the State to introduce evidence of either incident in a trial of the other. RP 31–33. The defense was given time to review the probable cause statement with Sprague, research what his potential jeopardy would be, and advise Sprague accordingly. RP 29–49.

The trial court ultimately denied the motion to continue, finding that the existence of an additional charge did not affect the current case,

that there would be no prejudice to the defense in defending against either charge, and that there would be minimal impact on Sprague's sentencing range since he had more than seven points. RP 46. Sprague has not shown that the trial court's decision was based on untenable grounds or reasons, given the lack of crossover between the alleged controlled buy incident and the possession with intent case. Additionally, Sprague has not shown that the outcome of the trial would have been different if the continuance had been granted. The same evidence that was presented to the jury in this trial would have been presented at a later trial. Therefore, the trial court did not err in denying Sprague's motion for a continuance.

B. The trial court correctly denied Sprague's motion to dismiss as sufficient independent evidence corroborated Sprague's incrimination statements such that *corpus delicti* was established.

The *corpus delicti* rule prevents the State from establishing that a crime occurred solely based on a defendant's incriminating statements. *State v. Hotchkiss*, 1 Wn. App. 2d 275, 278, 404 P.3d 629, (2017), citing *State v. Green*, 182 Wn. App. 133, 328 P.3d 988 (2014). The State must present evidence independent of the incriminating statement to show that a crime occurred. *Id.* In determining whether additional corroborative evidence exists, a reviewing court must "view the evidence and all reasonable inferences therefrom in the light most favorable to the State."

Id. Whether sufficient corroborating evidence exists to satisfy *corpus* is reviewed *de novo*. *Id.*

As this Court stated in *Hotchkiss*, analyzing the *corpus delicti* rule in a case of possession with intent to deliver requires an understanding of the evidence necessary to convict a defendant of that charge. Washington case law is clear that mere possession of a controlled substance, without more, is insufficient to convict a person of possession with intent to deliver. *State v. O'Connor*, 155 Wn. App. 282, 290, 229 P.3d 880 (2010); *State v. Hutchins*, 73 Wn. App. 211, 216, 868 P.2d 196 (1994) (possession of an amount of marijuana that the officer opined was more than normal for personal use is insufficient); *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993) (being in possession of 20 rocks of cocaine plus an experienced officer's testimony that that amount was more than that usually possessed for personal use insufficient); *State v. Cobelli*, 56 Wn. App. 921, 788 P.2d 1081 (1989) (possession of several baggies of marijuana totaling 1.4 grams insufficient). Washington case law is equally clear that "a finder of fact can infer intent to deliver from possession of a significant amount of a controlled substance plus one other factor." *Hotchkiss*, 1 Wn. App. at 280, citing *O'Connor*, 155 Wn. App. at 290 (large amount of marijuana, sophisticated grow operation, and scale sufficient to support a conviction for possession with intent to deliver);

Brown, 68 Wn. App. at 484; *State v. Hagler*, 74 Wn. App. 232, 236, 74 Wn. App. 232 (1994) (inference of intent to deliver could properly be drawn from possession of 24 rocks of cocaine and \$342); *State v. Lane*, 56 Wn. App. 286, 290, 786 P.2d 277 (1989) (one ounce of cocaine plus a scale and \$850 cash was sufficient). The *corpus delicti* rule is satisfied if there is “at least one additional factor suggestive of intent.” *State v. Whalen*, 131 Wn. App. 58, 63, 126 P.3d 55 (2005).

One such additional factor could be the presence of weighing devices. For example, Division III of the Washington Court of Appeals has held that there was insufficient evidence to convict of possession with intent, specifically stating that no weighing devices were found. *State v. Davis*, 79 Wn. App. 591, 595, 904 P.2d 306 (1995). In many of the cases cited above, the additional factor was a relatively large amount of cash. However, there is no indication in the case law that cash is a necessary requirement to support an inference of intent to deliver.

State v. Brockob sets out three elements that must be met in order to establish *corpus delicti*: 1) the evidence must independently corroborate a defendant’s incriminating statement; 2) the independent evidence must corroborate the specific crime with which the defendant has been charged; and 3) the independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d

311, 328–330, 150 P.3d 59 (2006). Though the trial court stated that the defense would win under *Brockob*, the three elements in this case have been met. The State requests this Court conduct a *de novo* review and find that Sprague’s motion to suppress was correctly denied.

First, the evidence in this case independently corroborates Sprague’s statement that he sells methamphetamine. Sprague was in possession of two separate baggies containing approximately nine to ten grams of methamphetamine, an operational digital scale with methamphetamine residue on it, and multiple plastic bags to be used as packaging for the methamphetamine. RP 127–139. The State’s witnesses testified regarding the differences between a user amount and a dealer amount of methamphetamine, indicating that three or three and a half grams and up is indicative of a dealer amount. RP 125. The State’s witnesses also testified that it is very common for drug sellers in this area to tear off pieces of plastic grocery bags, put the drugs inside, and either burn or tie the bag closed. RP 95, 139. This is not a case where, but for the confession, there is no evidence that the crime of possession with intent to deliver occurred; the scale and packaging materials support an inference of intent to deliver. Taken in the light most favorable to the State, the amount of methamphetamine, the scale, and the plastic bags

support a logical and reasonable inference that Sprague intended to deliver the methamphetamine.

Second, the evidence corroborates the specific crime with which Sprague was charged – possession of methamphetamine with intent to deliver. While a used methamphetamine pipe is consistent with use, rather than selling, of drugs, when taken together with the scale, the amount, and the existence of the packaging material in Sprague’s residence, the evidence supports the inference that Sprague intended to deliver the methamphetamine. The State’s witnesses testified that some people sell drugs to support their own habit – a person can buy a certain amount of illegal drugs to use some personally but also to sell some for a profit, thereby creating a cash flow to support their own continued use. RP 107–108, 125–26. Sprague is an example of just such a “user-dealer.” He has an amount of methamphetamine that can be sold while retaining some for his own use, he has a scale to weigh the drugs to be sold, and he has packaging materials to put the drugs in. Therefore, the evidence corroborates Sprague’s intent to deliver, independent of his incriminating statements.

Third, the independent evidence is consistent with guilt and inconsistent with innocence. In *Brockob*, a companion defendant was charged with attempted manufacture of methamphetamine based on his

possession of ephedrine and coffee filters. 159 Wn.2d at 321. A forensic scientist testified that coffee filters are used in the manufacturing process and that he “had rarely seen a methamphetamine lab that did not use coffee filters.” *Id.* The Washington Supreme Court held that the possession of coffee filters in addition to the ephedrine and evidence that the defendant was acting in concert with another person to obtain more than the legal quantity of ephedrine was sufficient independent evidence to corroborate the incriminating statements. *Id.* at 333. The Court ruled this way even though coffee filters are obviously legal to possess.

Similarly, Sprague was in possession of plastic grocery bags, in addition to methamphetamine and a used scale. The State’s witnesses testified that it is common for drug sellers in this area to tear pieces off of plastic grocery bags to package drugs in for sales, tying or burning the plastic to close it. RP 95, 108, 139. While plastic bags are not inherently illegal, the inference to be drawn based on these facts is one of intent to sell drugs. Therefore, taking the evidence and all reasonable inferences therefrom in the light most favorable to the State, there is sufficient independent evidence to support his incriminating statements regarding drug sales.

C. Sufficient evidence supported Sprague’s conviction for possession of methamphetamine with intent to deliver.

The standard of review for a claim of insufficient evidence is, after viewing the evidence in the light most favorable to the State, whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Smith*, 104 Wn.2d 497, 509, 707 P.2d 1306 (1985). A claim of insufficient evidence admits the truth of the State’s evidence and all inferences that can be reasonably drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 202, 829 P.2d 1068 (1992). Circumstantial evidence is considered no less reliable than direct evidence. *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991). In this case, in order for the jury to have reached a verdict of guilty, they had to find that the State proved that Sprague was in possession of methamphetamine and intended to deliver it.

As discussed above, Washington case law is clear that intent to deliver can be inferred from possession of a controlled substance plus one other factor. One such additional factor could be the presence of weighing devices, as mentioned in *Davis*, 79 Wn. App. 591 (1995). In many of the cases cited above, the additional factor was a relatively large amount of cash, and Sprague now argues that cash is required to support a conviction

for possession with intent to deliver. However, there is no indication in the case law that cash is a necessary requirement.

In this case, Sprague was found to be in possession of two separate baggies containing 10.21 grams of methamphetamine, a scale and other items with methamphetamine residue on them, and multiple plastic grocery bags that detectives recognized as consistent with drug packaging. RP 115, 128–30, 140. He also told officers that he sold methamphetamine and that he used the plastic grocery bags found in his apartment to package the drugs for sale. RP 99, 108, 115. Assuming the truth of the State's evidence and all reasonable inferences that can be drawn therefore, and under the general rule that possession plus one additional factor is sufficient to support an inference of intent to deliver, the evidence here is sufficient to support a conviction for possession with intent to deliver.

D. Trial counsel was not ineffective because she had the opportunity to advise Sprague regarding the potential for new charges, and Sprague fails to show prejudice as the outcome of the trial would not have changed.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225,

743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689.

The Washington Court of Appeals has devised the following test to determine whether counsel was ineffective: “After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978), *citing State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Like the *Strickland* test, this test requires the defendant to prove that he was denied effective representation, given the entire record, and that he suffered prejudice as a result. *Id.* at 263. The first prong of this two-part test requires the defendant to show that his lawyer “failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989). The second prong requires the defendant to show “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.* Therefore, even if a defendant can show that counsel was deficient, he also must show that the deficiency caused prejudice.

1. *Trial counsel was effective because she requested went over the probable cause statement with Sprague, informed him of his potential sentencing range, and had the chance to advise him on how to proceed.*

Sprague asserts that his trial attorney was unable to conduct appropriate investigation to determine what matters of defense were available. This is simply incorrect as to the case currently before this court, as discovery had been completed and both sides stated they were ready for trial prior to March 14, 2019. While trial counsel did not have much time to investigate the potential delivery charge based on the controlled buy officers had done with Sprague, she was still able to review the probable cause statement with him, go over his sentencing range, and discuss his options. There is no showing that trial counsel was deficient as to this case.

There is also no showing that trial counsel was deficient as to plea negotiations. She discussed tentative plea negotiations with Sprague, communicated the State's offer to not charge the delivery case, and had time to discuss the strengths and weaknesses of a potential delivery case with Sprague. Trial counsel did everything that was required and her performance was not deficient.

2. *Even if Sprague has shown that his trial counsel's performance was deficient, he fails to show that he was prejudiced by the attorney's actions.*

Even if this Court finds that trial counsel's performance was deficient, Sprague has failed to show that the result of the proceeding would have been different had a continuance been granted. As stated above, the same evidence would have been presented to a jury later if the requested continuance had been granted. There is no reason to believe that a different jury, presented with the same evidence, would have acquitted Sprague. There has also been no showing that Sprague's actions would have differed, in pleading guilty to the possession with intent charge or otherwise, if the continuance had been granted. Prejudice has not been shown.

E. There was no cumulative error in this case.

The cumulative error doctrine is limited to instances when there have been several trial errors that, standing alone, may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). The doctrine does not apply if "the errors are few and have little or no effect on the outcome of the trial." *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Based upon the above-stated arguments, there was no cumulative error in this case.

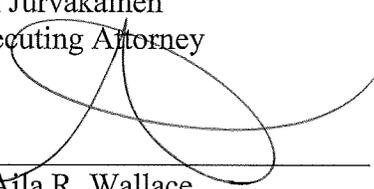
First, the trial court did not abuse its discretion in denying Sprague's motion for a continuance, as the potential for additional charges did not affect the case at bar. Second, sufficient corroborating evidence existed to establish *corpus delicti* and to support a conviction. Third, trial counsel was effective because she was able to secure a recess to go over the alleged controlled buy and discuss options with Sprague.

IV. CONCLUSION

For the above-stated reasons, Sprague's conviction should be affirmed.

Respectfully submitted this 22 day of November, 2019.

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By: 
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CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 26, 2019.



Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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