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NO. 54426-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN E. CANALES,

Appellant.

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. Corpus delicti is used to determine whether a defendant's statements are admissible. Because the State did not rely on Canales's statements, a corpus analysis is unnecessary.
2. Sufficient evidence supported Canales's conviction for possession of methamphetamine with intent to deliver.
3. Trial counsel was not ineffective because a challenge to the search warrant would have been denied.
4. The State did not abuse its discretion in charging Canales with possession with intent to deliver instead of attempted sale of heroin because those crimes are not concurrent.

II. STATEMENT OF THE CASE

On October 19, 2019, Detectives with the Longview Police Department Street Crimes Unit and the Cowlitz-Wahkiakum Narcotics Task Force served a search warrant at 1226 3rd Avenue in Longview, Washington. RP 218, 243, 249, 256. The warrant also allowed for the search of the defendant, John Canales. RP 219. He was contacted a short distance away from the warrant location, detained, and searched pursuant to the search warrant. RP 218–19. When Detective Hartley searched Canales, he located a small plastic baggie that contained 0.5 grams of methamphetamine in Canales's pocket. RP 219; RP 272, 278. Canales also had \$810 in his wallet. RP 250. When asked, he stated he had not been working recently, had not won at gambling recently, and had not sold

any cars recently. RP 251. His only explanation for the cash was that he had been saving his money. RP 252.

Canales was then taken back to the search warrant location at 1226 3rd Avenue, where he consented to the search of two motorhomes or RVs. RP 221. He was living in one motorhome and had control over the other. RP 228. While conducting surveillance prior to service of the search warrant, Detective Brent observed Canales going in and out of one of the RVs and walking toward the other. RP 245. She was unable to see whether he entered the other RV. *Id.* Detective Brent also observed Canales with a red duffel bag in his hand. RP 245.

Detectives searched both RVs. In one, they found the red duffel bag on a couch and three used methamphetamine pipes in a jacket that Canales stated was his. RP 221–22. Inside the red duffel bag was approximately 16 grams of heroin. RP 221, 277–78. In the other RV, detectives found a small amount of heroin and four or five small zip-top baggies. RP 222. No syringes or other paraphernalia commonly used to ingest heroin was found. RP 223. No scales or pay/owe sheets were found. RP 225.

The State charged Canales with of possession of heroin with intent to deliver and possession of methamphetamine and he was found guilty

after trial. CP 81, CP 83. He was sentenced to a total of 108 months. CP 96. He now timely appeals.

III. ARGUMENT

A. **Corpus delicti is used to determine whether a defendant's statements are admissible at trial. Because the State did not rely on Canales's statements, a corpus analysis is unnecessary.**

A trier of fact may not consider a defendant's out-of-court confession or admission unless independent corroborating evidence establishes that a crime occurred and that the defendant committed it. *State v. Cobelli*, 56 Wn. App. 921, 924, 788 P.2d 1081 (1989). This rule, 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). If there is independent proof of the crime, a confession may be considered in connection with that evidence. *State v. Smith*, 115 Wn.2d 775, 781, 801 P.2d 975 (1990). Without corroborating evidence, a defendant's statement is insufficient to support a conviction. *Id.*

Without corroborating evidence, it is error to admit a defendant's out-of-court confession or admission. *Cobelli*, 56 Wn. App. at 925. When reviewing cases based on a *corpus* argument, therefore, an appellate court

examines the evidence in the light most favorable to the State to determine whether it was sufficient to support the admission of a defendant's confession. *See id.*, *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). If the evidence was insufficient to admit the confession, the evidence is generally found to be insufficient to support a finding of guilt. *See Cobelli*, 56 Wn. App. at 925; *State v. Brockob*, 159 Wn.2d 311, 332, 150 P.3d 59 (2006).

Ultimately, the *corpus delicti* rule comes into play only when a defendant makes incriminating statements and the issue is whether there is sufficient evidence to corroborate those statements. In this case, the only issue is whether Canales had the intent to deliver the heroin found in his possession, so a *corpus* analysis would be focused on incriminating statements or confessions as to intent to deliver.

In this case, the State did not present any admissions or confessions that would be subject to the *corpus* rule. The only statements the State elicited at trial were: "That wasn't an ounce, that was a half-ounce," that Canales had not been working, that he liked to gamble but had not won recently, and that he bought and sold cars for money but had not sold any recently. RP 245, 250–51. None of these statements could be considered a confession or admission of intent to deliver the heroin found in Canales's trailer. In the Appellant's Brief, counsel merely asserts

that the State relied on Canales's statement that the heroin was closer to a half-ounce to argue for his guilt. There is no citation to the record to show this alleged reliance, nor is there any argument for why that particular statement is a confession. In fact, the evidence showed that Canales had seen the heroin before making the statement, undermining the idea that the statement proved he knew the heroin was in the bag. RP 252.

Because the State did not admit any confessions or admissions, the *corpus* rule does not apply and the Court need not consider this issue. The correct analysis would be whether the State presented sufficient evidence to prove its case.

B. Sufficient evidence supported Canales'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). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

State v. Price, 127 Wn. App. 193, 202, 110 P.3d 1171 (2005); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (appellate court will not review credibility determinations). Finally, circumstantial evidence is considered no less reliable than direct evidence. *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991).

In order to find Canales guilty in this case, the jury had to find that he was in possession of heroin, he intended to deliver that heroin, and the acts occurred in the State of Washington. RCW 69.50.401(1); CP 72.

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); *Cobelli*, 56 Wn. App. at 921 (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.2d 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). Therefore, there must be “at least one additional factor suggestive of intent.” *State v. Whalen*, 131 Wn. App. 58, 63, 126 P.3d 55 (2005).

In many of the cases cited above, the additional factor was a relatively large quantity of cash. For example, in *Hotchkiss*, the defendant had 8.1 grams of methamphetamine and \$2,150 in cash in a safe that was in his possession. 1 Wn. App.2d at 281–82. This Court held that those two facts taken together were sufficient to support a conviction of possession with intent to deliver. *Id.* at 182.

In *Hagler*, a juvenile was in possession of 24 rocks of cocaine, worth around \$20 each on the street, and \$342 in cash. 74 Wn. App. at 234. No other evidence was presented regarding the defendant’s intent, but the Court found that the evidence was sufficient to support a conviction of possession with intent to deliver.

Finally, in *Lane*, officers searched two different apartments – numbers 405½ and 405 – pursuant to a search warrant. *Lane*, 56 Wn. App at 289. In one apartment, officers found approximately one ounce of cocaine with indicia of occupation by Stacy Lane and Jesus Torres. *Id.* at 290. In the other, officers located Lane and Torres with \$850 and syringes. *Id.* A gram scale was also located in the apartment, though it is unclear whether it was with Lane and Torres’s belongings or otherwise connected with them. *Id.* Though the cash was in a separate apartment from the drugs, the Court held that there was sufficient circumstantial evidence from which the jury could reasonably infer that the defendants were dealing. *Id.* at 297.

This case is very similar to *Lane*. Here, officers found approximately 16 grams of heroin in Canales’s RV and \$850 in his possession. RP 221, 250. They also found methamphetamine pipes in the same RV as the heroin. RP 221. Under *Hotchkiss*, *Hagler*, and *Lane*, these facts alone would be sufficient to support a finding of guilt. However, the State presented even more evidence of intent in this case. Canales was in possession of very small plastic baggies consistent with those used to package illegal drugs. RP 222. He was not in possession of any items commonly used to ingest heroin but did have paraphernalia commonly used to ingest methamphetamine. RP 223. A reasonable jury

could infer that Canales uses methamphetamine and sells heroin, since there was no way to ingest heroin found at the scene. Finally, as the State pointed out in its closing argument, a reasonable juror could infer that Canales bought one ounce (or approximately 28 grams) of heroin, then sold around 11 grams for \$70 each, leaving him with 16 grams of heroin and \$810.

The amount of heroin, the cash, the packaging material, and the inferences that can reasonably be drawn from these items, there is sufficient evidence to support Canales's conviction for possession with intent to deliver.

C. Trial counsel was not ineffective because a challenge to the search warrant's validity would not have been granted.

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. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Id.* at 690. The court must

evaluate whether, given all the facts and circumstances, the assistance given was reasonable. *Id.* at 688.

If counsel's performance is found to be deficient, the defendant still must show prejudice. This requires the defendant to show "a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). In order to prove deficient performance or prejudice in the context of the failure to bring a motion, a defendant must show that the motion would have been granted. *State v. Gerds*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007).

1. *Trial counsel was not ineffective.*

In order to prove that trial counsel was ineffective for failing to challenge the search warrant, Canales must show that a motion to suppress would have been granted. Here, a challenge to the search warrant would not have been granted, so Canales cannot show that counsel was ineffective.

A search warrant may issue only upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists when "the affidavit supporting a search warrant sets forth facts sufficient

for a reasonable person to conclude the defendant probably is involved in criminal activity and that evidence of the crime can be found at the place to be searched.” *Thein*, 128 Wn.2d at 140, citing *Cole*, 128 Wn.2d at 286. Therefore, there must be a nexus between criminal activity and the item to be seized, and between the item to be seized and the place to be searched. *Thein*, 138 Wn.2d at 140; *State v. Goble*, 945 Wn. App. 503, 509, 945 P.2d 263 (1997). Additionally, an affidavit must include more than conclusory statements, suspicions, beliefs, or guesses. *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980); *State v. Higby*, 26 Wn. App. 457, 462, 613 P.2d 1192 (1980). The affiant must detail the facts in such a way that a magistrate can make his or her own decision regarding the existence of probable cause.

A magistrate’s determination of probable cause is reviewed for abuse of discretion and must be given great deference by a reviewing court. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). “An application for a search warrant should be judged in light of common sense with doubts resolved in favor of the warrant.” *Cole*, 128 Wn.2d at 286, citing *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). The issuing magistrate makes a commonsense, practical decision, and may make reasonable inferences from the facts and circumstances set out in the affidavit for the search warrant. *Maddox*, 152 Wn.2d at 505, 509.

A tip from an informant may establish or assist in establishing probable cause. When evaluating whether an informant's tip created probable cause for the issuance of a search warrant, Washington courts use the *Aguilar-Spinelli* test. First, "the officer's affidavit must set forth some of the underlying circumstances from which the informant drew his conclusions so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information." *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984) (citing *Spinelli v. United States*, 393 U.S. 410, 413 89 S. Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509 (1964)). This is referred to as the "basis of knowledge" prong. To satisfy this prong, "the informant must declare that he personally has seen the facts asserted and is passing on first-hand information." *Id.*

Second, "the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable." *Id.* The most common way to establish the credibility of the informant is through a showing of the informant's track record. If the informant has provided accurate information to the police a number of times in the past, his credibility will be shown. *Jackson*, 102 Wn.2d at 437, citing *State v. Woodall*, 100 Wn.2d 74, 76, 666 P.2d 364 (1983). Additionally, a controlled buy can establish

an informant's reliability. *State v. Lane*, 56 Wn. App. 286, 293, 786 P.2d 277 (1989), *State v. Steenerson*, 38 Wn. App. 722, 688 P.2d 544 (1984), *State v. Casto*, 39 Wn. App. 229, 692 P.2d 890 (1984).

Here, both prongs are met. First, the affidavit establishes that the informant had personal knowledge of the events and passed on first-hand information. To satisfy the "basis of knowledge" prong, the affidavit must show "that the information provided by the informant was based upon personal knowledge." *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002). Personal observations can satisfy the knowledge prong. *Vickers*, 148 Wn.2d at 114. The informant in this case personally observed Canales in possession of and selling methamphetamine. CP 14. The informant is familiar with methamphetamine because he or she had used it in the past. CP 13. Therefore, the knowledge prong is met.

Second, the informant's reliability is shown in the warrant affidavit. Detective Hartley wrote:

X has made multiple previous controlled purchases of controlled substances from known drug dealers in Cowlitz County. The information provided by X was found to be truthful and accurate.

CP 13. The affidavit establishes that the informant had conducted multiple controlled buys in concert with law enforcement. Controlled

buys can establish an informant's reliability. *Lane*, 56 Wn. App. at 293.

Therefore, the informant is reliable.

Because both prongs of the *Aguilar-Spinelli* test were met in this case, any challenge to the search warrant would not have been granted.

Therefore, Canales fails to show that trial counsel was ineffective.

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

Similarly, in order to prove prejudice, Canales must show that a motion to suppress would have been granted, thereby changing the outcome of the case. Because a challenge to the search warrant would not have been granted, Canales fails to show that he was prejudiced.

D. The State did not exceed its discretion by charging Canales with possession with intent to deliver instead of the attempted sale of heroin.

Prosecutors have wide discretion in making charging decisions that generally will not be disturbed absent a showing of vindictiveness. *State v. Lee*, 69 Wn. App. 31, 37, 847 P.2d 25 (1993). An individual charging decision depends on many factors, including the public interest, the prosecutor's analysis of the strength of the evidence, and the possible defenses. *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984).

There are constitutional limits on this discretion, though. When a general and a special statute are concurrent, the special statute applies and a defendant may only be charged under the special statute. *State v. Jendrey*, 46 Wn. App. 379, 382, 730 P.2d 1374 (1986); *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). Statutes are concurrent if the general statute will be violated in each instance in which the special statute has been violated. *Id.* However, this analysis does not apply to this case as the threshold requirement – that a defendant’s conduct can be charged under two statutes – has not been met.

The first step in a general-specific analysis is determining whether a person’s conduct can be charged under two different statutes. *State v. Cann*, 92 Wn.2d 193, 595 P.2d 912 (1979). If so, the question then becomes whether the statutes are general or specific. “[W]here a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute. Thus the prosecutor...is not at liberty to charge under the general statute a person whose conduct brings his offense within the special statute.” *Cann*, 92 Wn.2d at 197.

The key word, therefore, is conduct. The legal distinction involved in a general-specific analysis only applies when a person’s conduct can be charged under two separate statutes. In this case, Canales’s conduct was

not chargeable as the sale or attempted sale of heroin for profit, because there is no evidence to support these crimes.

There is no evidence in this case to support the crime of sale of heroin for profit or the attempted sale of heroin for profit. In order to prove sale of heroin for profit, the State must prove that the defendant sold a controlled substance and obtained some profit from the sale. RCW 69.50.410(1)(a). Profit is defined as anything of value. RCW 69.50.410(1)(b). This crime is focused on a past action. Here, the State had no evidence that Canales sold heroin to anyone. There is also no evidence that he was going to sell it for a profit – he could have given it away. The evidence presented indicated that he was in possession with intent to deliver at a later time.

Also, there was no evidence that Canales *attempted* to sell heroin for profit. In order to prove an attempt, the State must prove that, with intent to commit a specific crime, a defendant took a substantial step toward the commission of that crime. RCW 9A.28.020. To constitute a substantial step, the conduct must strongly corroborate the defendant's criminal purpose and must be more than mere preparation. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). Here, being in possession of a large amount of heroin and packaging materials can only be considered merely preparing to sell heroin. The State could not have

proven that Canales attempted to sell heroin because the evidence showed only preparation, not a substantial step toward commission of that crime.

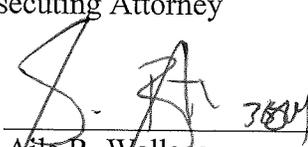
Because Canales's conduct could not have been charged under either possession with intent or the sale or attempted sale of heroin for profit, a general-specific analysis need not be done. The evidence in this case supported the charge of possession with intent to deliver; the State did not exceed its discretion.

IV. CONCLUSION

Canales's convictions should be affirmed as there was sufficient evidence to support the convictions, trial counsel was not ineffective, and the State did not abuse its discretion in charging.

Respectfully submitted this 5th day of October, 2020.

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CERTIFICATE OF SERVICE

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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 October 5th, 2020.


Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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