

FILED
NOV 23 2018
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28800-5-III

COURT OF APPEALS

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER L. MCCABE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

- A. The court erred by denying a defense motion to allow a witness to testify telephonically.
- B. The State's evidence was insufficient to support the convictions.

II.

ISSUES PRESENTED

- A. DID THE TRIAL COURT ERR IN PROHIBITING THE DEFENSE FROM PRESENTING TELEPHONIC TESTIMONY IN WHICH THE WITNESS INDICATED SHE WOULD NOT ANSWER ON STATE'S CROSS-EXAMINATION?
- B. DID THE STATE PRESENT OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT ON THE CHARGE?

III.

STATEMENT OF THE CASE

Det. Barrington of the Spokane Police Department testified that he was involved in setting up evidence gathering on drug purchases/sales by

a Richard Bordwell. RP 25. As part of the operation, the police used a confidential informant to make several purchases from Mr. Bordwell. RP 25.

During one particular attempt to purchase heroin, the CI was told by Mr. Bordwell that he did not have any heroin at that time. RP 29. The police theorized that Mr. Bordwell was going to seek a resupply of heroin. RP 30. At this point, the investigation shifted to determining who the source of the heroin might be. RP 30. The CI called Mr. Bordwell and Mr. Bordwell told the CI that he would soon be enroute to pick up a quantity of heroin. RP 30. The police watched Mr. Bordwell leave his residence and go to a "Money Tree" store and then return to his residence. RP 30.

Mr. Bordwell again left his residence and was followed to the Home Depot on East Sprague. RP 30-31. The police observed Mr. Bordwell pull into the parking lot, but he did not get out of his car at that time. RP 31-32. After waiting a few minutes, Mr. Bordwell went into the Home Depot and then returned to his car after a few minutes.

After a time, the defendant arrived in another car and pulled up and parked next to the Bordwell vehicle. RP 32. The defendant got into the passenger side of Mr. Bordwell's vehicle. RP 32. Det. Barrington saw what appeared to be conversation between Mr. Bordwell and the

defendant as well as activity as if the pair were handling an item and
“...maybe passing it back and forth.” RP 33. The defendant was in Mr.
Bordwell’s car for approximately three minutes. RP 33.

Det. Bordwell followed Mr. Bordwell into the city and Mr.
Bordwell’s vehicle was stopped. RP 34. In searching Mr. Bordwell’s
vehicle, Det. Barrington found “...a decent sized chunk of what appeared
to be heroin and \$20 was found on Mr. Bordwell’s person. RP 34. The
heroin turned out to weigh about 12 grams. RP 36.

Deputy Andrew Buell of the Spokane County Sheriff’s Office was
watching when the defendant pulled alongside Mr. Bordwell’s car in the
Home Depot parking lot. RP 55. The defendant got into Mr. Bordwell’s
car. RP 55. The amount of time the defendant spent in Mr. Bordwell’s
car appeared consistent with Deputy Buell’s experience with drug
exchanges taking place in an auto. RP 56.

After the defendant returned to his own car, he drove out of the
parking lot. RP 56. The police followed him. RP 56. Since he was in an
unmarked car, a patrol unit was used to initiate a stop of the defendant’s
car. RP 57.

In the defendant’s left front pocket, police found \$300 and a large
amount of a brown substance that Dep. Buell recognized as heroin. RP 58.
According to Dep. Buell, he has participated in well over 50-75 controlled

buys and in his opinion, the amount of money found in the defendant's pocket was consistent with the amount of controlled substance also found on the defendant. RP 59. Also located on the defendant was a wallet containing cash and money orders with no payee names on them. RP 64. There were three money orders for \$500 each for a total of \$1,500. RP 64. A total of \$1,460 cash was found in the defendant's wallet. RP 66.

In the defendant's vehicle were two cell phones. RP 66. According to Dep. Buell, the presence of the phones, which were ringing consistently, indicated trying to reach the defendant for drug transactions. RP 67. The phones were ringing throughout the stop and up to the point the phones were put on property. RP 67. Dep. Buell's estimate of the number of times the cell phones rang was 20 times. RP 68.

Dep. Buell testified that he did not find any syringes or other paraphernalia that would indicate personal use. RP 71.

Det. Brad Richmond is employed by the Spokane County Sheriff's Office. RP 7. Det. Richmond was part of the team watching Mr. Bordwell and was present in the Home Depot parking lot when the defendant arrived and got into Mr. Bordwell's car. RP 11. Det. Richmond could see the two persons in Mr. Bordwell's car talking back and forth and then the defendant left the area. RP 10-11. Det. Richmond recorded some of this activity on a video camera and the tape was played

for the jury. RP 13. The defendant was in Mr. Bordwell's car for approximately three to four minutes. RP 11. It appeared to Det. Richmond that the pair were exchanging items. RP 11.

Officer Tony Meyer of the Spokane Police Department testified that he assisted in the search of the defendant's car after it was impounded. RP 77-78. A brand new safe was discovered along with a laptop computer and two boxes of sports trading cards. RP 78. No drug paraphernalia indicative of drug usage was uncovered. RP 78.

Devon Donohue of the Washington State Patrol Crime Laboratory testified that the material taken from the defendant was, in fact, 12.5 grams of heroin. RP 81.

IV.

ARGUMENT

A. THE COURT DID NOT ERR IN DENYING THE DEFENSE MOTION TO PERMIT TELEPHONE TESTIMONY.

The standard of review applicable to the admission of testimony is found in ER 611. This court should review the lower court's decision using an abuse of discretion standard.

The defendant takes some leaps in his presentation on appeal and leaves out relevant information. It is true that there normally is no

problem with telephonic testimony. The problem in this case is that despite the defendant's claims on appeal regarding the nature of the witnesses testimony, no offer of proof was made (beyond it being exculpatory) by defense counsel at trial. No court could know whether the proffered testimony was irrelevant. The basis of the witness' testimony and how it was exculpatory was not disclosed to the trial court. The defendant would like the trial court to have made its decisions based on the vague assertions of trial defense counsel.

The reason for the telephonic testimony appears to have been simply the desire of the witness not to come to court. There was no information supplied to the trial judge pertaining to the witness' age, health or any other factor bearing on physical reasons why the witness could not appear in court. Clearly, she did not want to appear in court, but the State submits that many, if not most, witnesses would rather be somewhere other than in court.

The defense counsel candidly told the trial court that he would not subpoena the witness except for telephonic testimony. RP 8. At a slightly later point, defense counsel told the trial court that the defense would not be requesting a material witness warrant. RP 9. Thus, it was the defense counsel's refusal to subpoena the witness that precluded her appearance in court.

It was the defendant's choice rather than a mistake by the trial court that prevented the requested testimony from being heard by the jury.

A strong factor weighing against any lingering doubts regarding the necessity of the testimony was the fact that the witness took the position that not only would she not appear in court, she was not going to answer the State's cross-examination questions. RP 5. Solely based on this factor, a trial court would not be abusing its discretion to prohibit the telephonic testimony. When reduced to its essence, defendant's motion was a request to present unsworn, one-sided testimony. The proposed testimony would only be of unknown relevance and beyond the State's ability to cross-examine. Thus, the defendant was asking to present one-sided testimony from a witness who would not allow the State to probe her veracity. Being out of the presence of the court, the judge would have minimal control of the witness. This presents a situation that no trial judge would approve.

B. THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S VERDICT.

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court will defer to the jury on the credibility of witnesses and

the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999). Even if an appellate court is convinced that a verdict is incorrect, that court will not overturn the verdict of the jury. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964).

We give deference to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The defendant on appeal asserts that some of the evidence is circumstantial. The State disagrees that any major part of the evidence was circumstantial, but ultimately it makes no difference whether some, or even all of the State's evidence was circumstantial. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The argument being made by the defendant on appeal is that the defendant's arguments "trump" the analysis. In other words, if the defendant presented evidence against any particular aspect of the State's case, the corresponding State's evidence "disappears" and the jury is then left with insufficient data from which to make its decisions. As stated

before, “[W]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). The jury decides what to accept and what to reject. The defendant argues that he was a “heavy user” and at best the State’s evidence showed possession of a controlled substance. The defendant’s argument ignores much of the State’s testimony. At least two officers testified that they saw what appeared to them to be an exchange of items while the defendant was in Mr. Bordwell’s car. As far as the defendant making a purchase in the Home Depot bathroom, several officers testified that the defendant never went into the Home Depot store. Then there is the fact that searches of the defendant’s person at the time of the stop revealed no paraphernalia for using drugs. A search of the defendant’s car after it was impounded also showed no paraphernalia for personal use.

The testimony was that Mr. Bordwell told the CI that he was out of heroin but he was soon to obtain more supplies. Mr. Bordwell goes to the Money Tree and a short time later goes to the Home Depot. When Mr. Bordwell was stopped he had a piece of heroin on his person as well as \$20. The logical inference is that Mr. Bordwell arrived at Home Depot with no heroin but some money and left with only \$20 and a quantity of

heroin. The logical inference, given the police surveillance of Mr. Bordwell and the observations in the Home Depot parking lot, would be that Mr. Bordwell got his heroin from the defendant during their 3-4 minute encounter in Mr. Bordwell's car. In a sufficiency of the evidence analysis, all inferences are resolved in favor of the State. *Partin, supra*.

Some peripheral information for the jury was the presence of two cell phones that were "consistently" ringing during the defendant's arrest and transport of the phones to property.

There was also the large quantity of heroin still on the defendant's person, along with a considerable quantity of cash and three money orders totally \$1,500. The defendant's explanation is that he was collecting rents for a relative. No juror would accept this explanation as the money orders did not have the payee filled in. Few renters would give their landlord blank money orders.

The State presented uncontestable evidence in the form of video surveillance taken by Det. Richmond.

The State's case was not based on speculation by the police regarding the amount of heroin used by the defendant. It was based on the observations by many officers along with video support.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 23rd day of November, 2010.

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