

32197-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

FILED
AUG 21, 2014
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, RESPONDENT

v.

ERIN E. MCGOVERN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT..... 1

 A. THE TRIAL COURT DID NOT ABUSE ITS
 DISCRETION IN DENYING DEFENDANT’S MOTION
 FOR A MISTRIAL. 1

 B. THE TRIAL COURT PROPERLY DENIED THE
 DEFENDANT’S SUPPRESSION MOTION 7

 1. The Trial Court’s Conclusion of Law that the Consensual
 Search of the Vehicle and the Warrant-Based Search of
 Defendant’s Personal Items Was Legal Was Based Upon
 Substantial Evidence. 7

 2. Alternatively, the Trial Court Properly Exercised Its
 Discretion in Admitting the Evidence Produced During the
 Search of the Vehicle and Defendant’s Personal Items. 9

 C. SUFFICIENT EVIDENCE SUPPORTED THE JURY
 VERDICTS. 11

V. CONCLUSION 13

TABLE OF AUTHORITIES

CASES

<i>Sofie v. Fiberboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711, <i>corrected</i> , 780 P.2d 260 (1989)	5
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971)	10
<i>State v. Cole</i> , 122 Wn.App. 319, 93 P.3d 209 (2004).....	8
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004).....	10
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	9
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008).....	8
<i>State v. Gamble</i> , 168 Wn.2d 161, 225 P.3d 973 (2010)	5
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	11
<i>State v. Hagler</i> , 74 Wn.App. 232, 872 P.2d 85 (1994)	12
<i>State v. Lopez</i> , 79 Wn.App. 755, 904 P.2d 1179 (1995)	12
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007)	10
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	5
<i>State v. O’Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	8
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	12

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erroneously denied defendant's motion for a mistrial.
2. The trial court erroneously denied defendant's motion to suppress evidence.
3. The trial court erroneously denied defendant's motion to dismiss the charged offenses for insufficient evidence.

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion by denying a motion for a mistrial based on the admission of evidence?
2. Did the trial court abuse its discretion by denying the defendant's suppression motion?
3. Did the trial court abuse its discretion by denying the defendant's motion to dismiss the charged offenses for insufficient evidence?

III. STATEMENT OF THE CASE

The respondent accepts appellant's statement of the case for purposes of this appeal only.

IV. ARGUMENT

- A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL.

Defendant claims that the trial court erred when it denied her motion for a mistrial based upon the admission of evidence. Defendant

contends that her rights under the United States Constitution, Fourth Amendment, and Washington Constitution, Art. I, §7, were violated by the admission of her statement to investigating officers that she did not consent to a satchel being searched. Defendant argues that the admission of this evidence constituted a violation because it was used as substantive evidence of her guilt and that the prejudice was not cured by the trial court's curative instruction.

Here, the evidence is undisputed that Spokane County Sheriff Deputies made a traffic stop of a vehicle that was speeding on Interstate 90 in Spokane County, Washington, on June 19, 2012. CP 169-171; RP 89-90. The driver of the vehicle was driving with a suspended license and could not provide a vehicle registration or proof of insurance. CP 169-171; RP 90. Of the three people in the vehicle, no one could accurately provide the name of the registered owner of the vehicle. CP 169-171; RP 91-92. The defendant volunteered the incorrect name "Victor Antoine" as the registered owner despite not being asked. CP 169-171; RP 91.

The circumstances prompted the deputies to request the driver's consent to search the vehicle. The driver gave the deputies verbal and, later, written consent to search the vehicle. CP 169-171; RP 93-94, 136-141. Deputies requested that the three occupants of the vehicle exit to

facilitate the consented search. CP 169-171; RP 94, 147-148. In plain view in the back seat of the vehicle, deputies found shaved car keys which are commonly known to be used to steal cars, an open alcohol container, and a credit card that did not match the identity of anyone in the vehicle. CP 88-91, 169-171. In the vehicle glove box deputies found a digital scale with a dusting of a white crystalline powder which they suspected was methamphetamine, a controlled substance. CP 169-171; RP 107. The search of the trunk discovered another digital scale with a similar dusting of a white crystalline substance and a vest containing pistol ammunition. CP 169-171; RP 94. In the back seat, deputies found a bag with two laptop computers in plain view which the defendant identified as hers and denied deputies consent to search. CP 169-171; RP 95. Deputies set the bag aside and did not search it at that time. CP 169-171; RP 105. In the front area of the vehicle near the passenger seat where defendant had been seated, deputies observed a large purse and a smaller purse that was sitting in the bucket passenger seat. CP 169-171; RP 106. The defendant identified both purses as being hers and requested that those not be searched. The deputies did not search the purses pursuant to the defendant's instructions. CP 169-171; RP 105-106.

Deputies determined that the circumstances directed that the vehicle be impounded and a search warrant requested. CP 169-171;

RP 107. Deputy Bohanek called for a contract tow of the vehicle, cited the driver for traffic offenses, and released all three occupants at the scene. CP 169-171; RP 108-109. The defendant was neither handcuffed nor arrested. CP 169-171; RP 108. On June 21, 2012, Deputy Bohanek obtained a search warrant for the impounded vehicle and the defendant's bag and purses. CP 88-91; RP 108. The search of the larger purse discovered several photo-identifications of the defendant. CP 88-91; RP 110-113. The search of the smaller purse revealed: (1) a small cylinder which tested positive for methamphetamine, (2) a credit card and the Washington State driver's license of "Brendan Cassida," and, (3) two tobacco tins which contained 199 pills which included 6 different scheduled substances and 9 legend drugs. CP 88-91; RP 114-116. Upon contact, Brendan Cassida advised that the defendant did not have permission to possess his driver's license. CP88-91; RP 155-156.

Pursuant to the defendant's pretrial suppression motion and the record created, the trial court concluded that the traffic stop for speeding was valid. CP 88-91; RP 40, 42. The questioning of the three vehicle occupants was reasonable. CP 88-91; RP 41. The three occupants were appropriately asked to exit the vehicle based upon officer safety concerns. CP 88-91; RP 41, 43. The search of the vehicle was consensual and valid based upon the driver's initial verbal, and later, written consent. CP 88-91;

RP 43. The search of the vehicle and its contents pursuant to the search warrant was valid and lawful. CP 88-91; RP 43. The search warrant sufficiently described the subject and objective of the search and was based upon probable cause. CP 88-91; RP 43-45.

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. A mistrial should be granted when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. A denial of a motion for mistrial should be overturned only when there is a substantial likelihood that the prejudice affected the verdict. ... Thus, when a trial irregularity occurs, the court must decide its prejudicial effect. 'In determining the effect of an irregularity, the court examines (1) its seriousness; (2) whether it involved cumulative evidence; and, (3) whether the trial court properly instructed the jury to disregard it.'

State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (Citations and alterations omitted). An abuse of discretion exists when "no reasonable judge would have reached the same conclusion." *Sofie v. Fiberboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, *corrected*, 780 P.2d 260 (1989). Only errors affecting the outcome of the trial will be deemed prejudicial. *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986) .

Here, the defendant moved for a mistrial after the deputy sheriff testified that the defendant had "identified the bag as being hers ... she did not want me to search the bag...." RP 96. Defendant claimed that the state had introduced evidence that she had exercised her constitutional rights as

evidence of her guilt. The trial court recessed the trial, heard argument, and reviewed the cited case law on the issue. RP 98-99. The trial court noted that the case law focused on whether the subject evidence had been introduced as substantive evidence of guilt, yet herein the evidence was offered to explain why the deputies had sought a search warrant for the vehicle and contents. RP 99-101. Nevertheless, the trial court did offer the defendant the option of having the court provide a curative instruction with regard to how the jury was to use that evidence. RP 101-104. The trial court proposed that the curative instruction would include that the jury was not to “infer guilt in any way” from the deputy’s testimony regarding defendant’s response. RP 103-104. The defendant did so request a curative instruction and the jury was instructed, “You are to infer no guilt upon the defendant’s exercise of these rights nor are you to consider this testimony during your deliberations.” CP 116-136 (Instruction No. 6).

Applying the case law to the record herein, the trial court cannot be said to have abused its discretion in denying the motion for a mistrial. The jury heard evidence that the purses in which the contraband was found that was the basis for the charged offenses were found in a bucket seat that was solely occupied by the defendant; who was the last occupant to exit the vehicle and set nothing down upon exiting; and, the deputy’s initial contact with the vehicle driver was through the front passenger side

window. The reasonable inference from such evidence was that the purses, as defendant claimed to the Deputy, were her property. Additionally, the evidence before the jury was that the deputy inquired of all three occupants to whom the purses belonged and it was the defendant who volunteered her ownership and that the purses were not to be searched. The deputy's response was to immediately set the purses aside and await the authorization afforded by a warrant to then search the contents thereof. Accordingly, no abuse of discretion occurred because the comment in the context of the entire record was cured by the curative instruction, so the trial court properly denied defendant's motion.

B. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S SUPPRESSION MOTION

1. The Trial Court's Conclusion of Law that the Consensual Search of the Vehicle and the Warrant-Based Search of Defendant's Personal Items Was Legal Was Based Upon Substantial Evidence.

At the pretrial hearing defendant argued that the traffic stop of the vehicle was pre-textual and illegal, and that the trial court should have suppressed any evidence discovered as a result thereof. On appeal, defendant assigns error to the trial court's failure to suppress the evidence due to the allegedly illegal traffic stop. The defendant does not specifically assign error to the trial court's factual findings based upon the evidence produced during the CrR 3.6 hearing. Instead, the defendant contends that

the trial court's legal conclusion was erroneous that the evidence discovered during the search of the vehicle and defendant's personal items was admissible.

A trial court's denial of a Criminal Rule ("CrR") suppression motion is reviewed to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law. *State v. Cole*, 122 Wn.App. 319, 322-323, 93 P.3d 209 (2004). Defendant does not assign error to the trial court's factual findings, so they are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Accordingly, the factual findings that the traffic stop of the vehicle in which defendant was a passenger was not pre-textual, the search of the vehicle was consensual, and that the search warrant was validly issued are verities for this appeal. The issue, then, is whether the trial court's factual findings support its legal conclusions. *Cole, supra*, at 322-323. A trial court's conclusions of law are reviewed de novo. *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008).

As previously noted, the record created at the defendant's pretrial suppression motion supported the trial court's following legal conclusions: The traffic stop for speeding was valid. CP 88-91; RP 40, 42. The questioning of the three vehicle occupants was reasonable. CP 88-91;

RP 41. The three occupants were appropriately asked to exit the vehicle based upon officer safety concerns. CP 88-91; RP 41, 43. The search of the vehicle was consensual and valid based upon the driver's initial verbal, and later, written consent. CP 88-91; RP 43. The search of the vehicle and its contents pursuant to the search warrant was valid and lawful. CP 88-91; RP 43. The search warrant sufficiently described the subject and objective of the search and was based upon probable cause. CP 88-91; RP 43-45. Accordingly, the trial court's legal conclusion that the evidence discovered during the consensual search of the vehicle and search of her personal belongings pursuant to a search warrant was admissible was carefully reasoned and supported by the evidence.

2. Alternatively, the Trial Court Properly Exercised Its Discretion in Admitting the Evidence Produced During the Search of the Vehicle and Defendant's Personal Items.

Defendant contends that the trial court erred in failing to suppress the evidence discovered during the consensual search of the vehicle and the warrant-based search of her personal belongings. The other side of the assignment of error is that the trial court abused its discretion in admitting the subject evidence.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). That standard is well-recognized. *State ex rel. Carroll v.*

Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). The court's ruling regarding admissibility may be affirmed on any grounds adequately supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). A trial court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

As previously noted, here, the record establishes that the vehicle in which defendant was a passenger was legally stopped by sheriff deputies. CP 88-91. The driver's license was suspended. CP 88-91. None of the three occupants could identify the registered owner of the vehicle. CP 88-91. Defendant spontaneously misidentified the registered owner of the vehicle. CP 88-91. The driver of the vehicle consented to the search of the vehicle without duress or coercion. CP 88-91. Evidence of criminal activity was in plain view (shave keys, open liquor container, and a credit card that was not identified with any of the occupants). CP 88-91. The consensual search of the vehicle discovered two digital scales with methamphetamine residue. CP 88-91. The three bags in the vehicle that the defendant identified as her personal property were set aside and not searched until a warrant was secured. CP 88-91. The execution of the warrant on the defendant's three bags revealed a container with

methamphetamine, several pieces of identification belonging to defendant, a credit card and license belonging to Brendan Cassida which defendant did not have permission to possess, and two tobacco tins containing 199 pills that included 6 different scheduled substances and 8 different legend drugs. CP 88-91. Clearly, the defendant has failed to show that the trial court's evidentiary ruling constituted an abuse of discretion.

C. SUFFICIENT EVIDENCE SUPPORTED THE JURY VERDICTS.

Defendant contends that insufficient evidence supported the jury verdicts finding the defendant guilty of the charged crimes. Defendant claims that the evidence did not support findings that she had knowingly possessed the identification of another or had possessed controlled substances.

The standard for adjudging the sufficiency of the evidence to support a verdict is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). In reviewing the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. *State v. Lopez*, 79 Wn.App. 755, 768, 904

P.2d 1179 (1995); *State v. Hagler*, 74 Wn.App. 232, 235, 872 P.2d 85 (1994). In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Application of that standard requires affirming the convictions rendered by the jury.

Here, the evidence amply supported the jury's verdicts that the defendant was guilty of: Count I Possession of a Controlled Substance-methamphetamine; Count II Possession of Another's Identification; Count III Possession of a Controlled Substance – Alprazolam; and Count IV Possession of a Controlled Substance – Methylphenidate Hydrochloride. As noted previously, the evidence included that: the defendant claimed ownership of three bags that were observed inside the vehicle in which she was a passenger (RP 95-96, 104-107); a search warrant was obtained (RP 109) and executed upon her bags (RP 110); the execution of the search warrant discovered defendant's identification (RP 110-114), a cylinder containing methamphetamine (RP 115), a credit card and Washington driver's license for Brendan Cassida (RP 114-115) which defendant did not have permission to possess (RP 155-156), and two tobacco tins that contained numerous pills which included the controlled

substances Alprazolam and Methylphenidate Hydrochloride (RP 115-119, 211-213).

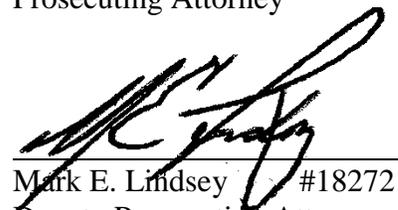
Accordingly, there was sufficient evidence from which the jury could find beyond a reasonable doubt the defendant guilty of the offenses charged.

V. CONCLUSION

For the reasons stated above the defendant's convictions and sentences should be affirmed.

Dated this 21 day of August, 2014.

STEVEN J. TUCKER
Prosecuting Attorney



Mark E. Lindsey #18272
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

ERIN E. MCGOVERN,

Appellant,

NO. 32197-5-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 21, 2014, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Douglas Dwight Phelps
phelps@phelpslaw1.com

and mailed a copy to:

Erin Elizabeth Mcgovern
17412 E Mansfield Ave.
Spokane Valley WA 99206

8/21/2014

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)