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FEBRUARY 27, 2015
Court of Appeals
Division III
State of Washington

No. 32612-8-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 13-1-00640-6

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

GERHARD R. WINTERMEIER, JR.,
Defendant/Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
I. <u>STATEMENT OF THE CASE</u> -----	1
II. <u>ISSUES AND ARGUMENT</u> -----	3
<u>WHETHER THE SENTENCING ENHANCEMENTS ON COUNTS 2 AND 3 ARE SUPPORTED BY SUFFICIENT EVIDENCE</u> -----	3
III. <u>CONCLUSION</u> -----	7

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>State v. Benzivenga</u> , 137 Wn.2d 703, 706, 974 P.2d 832 (1999)-----	3
<u>State v. Eaton</u> , 168 Wn.2d 476, 229 P.3d 704 (2010)-----	4,5
<u>State v. Kintz</u> , 169 Wn.2d 537, 551, 238 P.3d 470 (2010)-----	3
<u>State v. McGee</u> , 122 Wn.2d 783, 864 P.2d 912 (1993)-----	6
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)-----	3
<u>State v. Vasquez</u> , 178 Wn.2d 1, 6, 309 P.3d 318 (2013)-----	3

I. STATEMENT OF THE CASE

On June 5, 2013, Mr. Wintermeier delivered methamphetamine to an informant working with the police during a "controlled buy" operation at the parking lot of the Wenatchee Walmart. (RP 81-86, 140, 142, 174-79). The location of this delivery of methamphetamine was within 1000 feet of a school bus stop. (RP 154, 208-09).

On June 26, 2013, Mr. Wintermeier made another delivery of methamphetamine to the same informant during a controlled buy operation. (RP 91-92, 137, 179-83). This delivery occurred in the parking lot of the Buckboard Café on Highway 97, near the intersection with Roller Coaster Road in Chelan County. (RP 210-14). The location of the delivery of methamphetamine was within 1000 feet of a school bus stop located at this intersection. (RP 120-21, 218).

Following the delivery of methamphetamine at the Buckboard Café, Mr. Wintermeier drove away from the scene and headed westbound on Highway 2 toward Leavenworth. Mr. Wintermeier's vehicle was subsequently stopped by the police in front of a store called Smallwood's located on Highway 2, where

the defendant was arrested. (RP 155-56). The buy money from the controlled buy at the Buckboard Café was found on the defendant's person at the time of his arrest. (RP 137). There is a designated school bus stop at Smallwood's. (RP 121). After Mr. Wintermeier was arrested and advised of his Miranda rights, he told the police that he had delivered methamphetamine to the informant at the Buckboard Café. (RP 146). He also told the police that there was methamphetamine in his vehicle which was packaged for sale. His car was seized and searched and found to contain methamphetamine. (RP 224, 226).

Mr. Wintermeier was subsequently charged and convicted of two counts of delivery of methamphetamine within 1000 feet of a school bus stop, as well as possession of methamphetamine with intent to deliver within 1000 feet of a school bus stop. (CP 82-87).

This appeal followed his convictions.

II. ISSUES AND ARGUMENT

WHETHER THE SENTENCING ENHANCEMENTS ON COUNTS 2 AND 3 ARE SUPPORTED BY SUFFICIENT EVIDENCE.

The defendant claims that there was insufficient evidence to subject him to the school bus stop enhancements on counts 2 and 3. A review of the sufficiency of the evidence asks whether after “viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013) (quoting State v. Benzivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999)). By challenging the sufficiency of the evidence, Mr. Wintermeier “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Equal weight is given to both direct and circumstantial evidence during a review of the sufficiency of the State’s evidence and either type of evidence may sustain a conviction. Kintz, 169 Wn.2d at 551.

Mr. Wintermeier first contends that he is not subject to the enhancement for count 3 because the State did not show that he volitionally possessed drugs with intent to deliver in the protected area at Smallwood's. This contention is predicated on State v. Eaton, 168 Wn.2d 476, 229 P.3d 704 (2010). In Eaton, the defendant had been arrested for driving under the influence of drugs or alcohol and transported to the county jail. Police discovered methamphetamine in his sock during a search at the jail. Id. at 479. He was charged with both DUI and one count of possession of a controlled substance. Id. The prosecutor also alleged an enhancement that the controlled substance crime was committed in the county jail. Id. at 479-480. The court in Eaton concluded that the defendant was not subject to the drug enhancement because he had not brought the drugs to the jail on his own volition. The court's majority believed the purpose of the "zone" enhancement was not served where the defendant had not voluntarily taken the drugs to that location. Id. at 484-487. The majority also expressly held that the State was entitled to a permissive inference that a person is within a zone of his or her own volition. Id. at 486-487. Under the facts in Mr. Eaton's case, the permissive inference was insufficient to prove that he

“volitionally possessed drugs inside the enhancement zone.” Id. at 487.

The contention that the instant case is similar to Eaton fails. First, the evidence clearly demonstrates that Mr. Wintermeier, of his own volition, drove his vehicle westbound on Highway 2 on a path passing directly in front of Smallwood's. Hence, even without being stopped by the police in front of Smallwood's, the defendant would have passed through the protected zone. The enhancement is based on where the defendant commits his crime; it is not based on where he is stopped and arrested for his crime. Furthermore, the sufficiency of the evidence is even more apparent when one views the evidence in light of the State's entitlement to a permissive inference that Mr. Wintermeier was within a zone of his own volition. Id. at 486-487. In addition, there is sufficient evidence for the enhancement on count 3 based on that crime also being committed within 1000 feet of the school bus stop located at the intersection of Highway 97 and Roller Coaster Road as he traveled into the protected zone heading to and away from Smallwood's.

Mr. Wintermeier also claims that there was insufficient evidence for the enhancement because of the absence of any testimony that he intended to deliver those drugs within the school

bus stop zone. This claim also fails. In State v. McGee, 122 Wn.2d 783, 864 P.2d 912 (1993), the court held:

RCW 69.50.401(a) does not require an intent to deliver within a particular area, only an intent to deliver. We therefore hold that RCW 69.50.435(a) does not require the State to prove the intended delivery site was within 1000 feet of the perimeter of a school ground.

The holding and reasoning of McGee clearly indicates that the State has no burden to prove that the intended delivery site was within the protected zone, and Mr. Wintermeier has provided no authority for the proposition that the State had such a burden.

Mr. Wintermeier also asserts on appeal that there is insufficient evidence of the enhancement on count 2, apparently based on an argument of inadequate measurement. However, Mr. Bentz, the transportation official from the school district, testified that there was a school bus stop at the intersection of Roller Coaster Road and Highway 97, and he testified that it was the closest school bus stop to the Buckboard Café. (RP 121). Then, Trooper Giacomazzi testified that he measured the distance from the location of the delivery of methamphetamine at the Buckboard Café to the intersection of Roller Coaster Road and Highway 97 and that the distance was 528 feet. (RP 218). Given this evidence

as to the location of the delivery involved in count 2 and its proximity to the school bus stop at Roller Coaster Road and Highway 97, there is obviously sufficient evidence for the enhancement. This is even more strikingly true when one views the evidence in the light most favorable to the State.

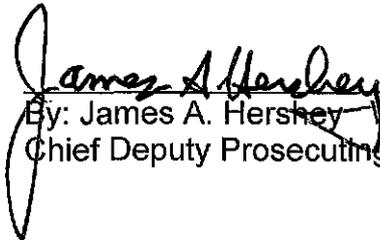
III. CONCLUSION

For the reasons set forth above, the State submits that Mr. Wintermeier's convictions, including all enhancements, must be affirmed.

DATED this 27th day of February, 2015.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney


By: James A. Hershey WSBA #16531
Chief Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,)	No. 32612-8-III
Plaintiff/Respondent,)	Superior Court No. 13-1-00640-6
vs.)	DECLARATION OF SERVICE
GERHARD R. WINTERMEIER, JR.,)	
Defendant/Appellant.)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 27th day of February, 2015, I electronically transmitted to:

Renee S. Townsley
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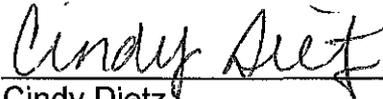
AND deposited in the United States Mail properly stamped and addressed envelopes directed to:

Dennis W. Morgan
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Gerhard R. Wintermeier, Jr.
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Olympic Corrections Center
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1 said electronic transmission and envelopes containing true and correct copies of Brief of
2 Respondent.

3 Signed at Wenatchee, Washington, this 27th day of February, 2015.

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5 _____
6 Cindy Dietz
7 Legal Administrative Supervisor
8 Chelan County Prosecuting Attorney's Office
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