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Court of Appeals
Division III
State of Washington
3/13/2020 12:31 PM

No. 36412-7-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 17-1-00140-7

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

MODESTO BRAVO GONZALEZ,
Defendant/Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

In February and March 2017, law enforcement officers with the Columbia River Drug Task Force (Task Force) made 4 controlled buys of controlled substances from the defendant at his home at 1305 Crescent Street in Wenatchee using a confidential informant, Isaac Garcia-Alvarez (CI). On February 21, 2017, the CI purchased 23 grams of methamphetamine in exchange for \$520. (RP 74-75). On March 2, 2017, the CI purchased an ounce of methamphetamine for \$450. (RP 76-78). On March 9, 2017, the CI purchased 26 grams of methamphetamine for \$400. (RP 78-80). On March 15, 2017, the CI purchased heroin in exchange for \$240. (RP 80-82).

On March 17, 2017, the Task Force executed a search warrant at the defendant's residence. The defendant lived there with just his 9-year-old daughter and his mother, who appeared to be in her late 60's or early 70's. (RP 84, 117-118, 263). The defendant paid half of the rent for the residence. (RP 268).

During the service of the search warrant on March 17, 2017, officers found heroin in the pocket of a jacket located by the front door. (RP 87). They also found 2 scales, 3 cell phones, packaging material, and \$120 in cash in the defendant's bedroom. (RP 118). The packaging

material was found next to the scales. (RP 118). One of the scales was coated in heroin. (RP 118, 164-165). Two shotguns and shotgun shells were found in the basement of the home. (RP 234-236).

On the dates involved, there was a school bus stop located approximately 300 feet from the defendant's residence at 1305 Crescent Street. (RP 179-181, 241).

The defendant was charged with delivery of methamphetamine within 1000 feet of a school bus stop on February 21, 2017 (count 1), delivery of methamphetamine within 1000 feet of a school bus stop on March 2, 2017 (count 2), delivery of methamphetamine within 1000 feet of a school bus stop on March 9, 2017 (count 3), delivery of heroin within 1000 feet of a school bus stop on March 15, 2017 (count 4), unlawful possession of a firearm in the first degree on March 17, 2017 (count 5), possession of an unlawful firearm on March 17, 2017 (count 6), unlawful possession of a firearm in the first degree on March 17, 2017 (count 7), possession of heroin with intent to deliver within 1000 feet of a school bus stop on March 17, 2017 (count 8), and maintaining a drug property on or between February 21, 2017 and March 17, 2017 (count 9).

The case proceeded to a jury trial. (RP 63-269). The jury found the defendant guilty as charged in counts 3, 4, 5, 6, 7, 8, and 9. (RP 355-

358). The defendant was not convicted on counts 1 and 2. (RP 358-430).

The defendant timely appealed. (CP 340-341).

II. ARGUMENT

A. There Was Sufficient Evidence to Convict the Defendant of Unlawful Possession of a Firearm in the First Degree as Charged in Counts 5 and 7.

The defendant contends that there was insufficient evidence to convict the defendant of unlawful possession of a firearm in the first degree. The test for determining the sufficiency of evidence is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that can be drawn therefrom.” *Id.* All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.*

The elements of a crime may be established by the direct or circumstantial evidence, and one type is no more valuable than the other. *State v. Wilson*, 141 Wn. App. 597, 608, 171 P.3d 501 (2007). On review,

the court defers to the jury on credibility determinations, assessing discrepancies in the trial testimony, and weighing the evidence. *Id.*

A person actually possesses an item when it is in his or her physical control and constructively possesses an item that is not in his or her physical custody, but is still within his or her “dominion and control.” *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession need not be exclusive. *State v. Mobley*, 129 Wn. App. 378, 384, 118 P.3d 413 (2005). To determine constructive possession, a court determines, under the totality of the circumstances, whether the defendant exercised dominion and control over the item in question. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1997), overruled on other grounds by *State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012).

Partin provides an example of sufficient indicia of premises control. In *Partin*, the defendant regularly parked his motorcycle on the premises, received phone calls there, stored personal documents and effects on the premises, and acted as vice president of a club operating on the premises. 88 Wn.2d at 907. These facts showed that the defendant exercised dominion and control over the premises and therefore constructively possessed drugs found on the premises. *See, also, State v. Echeverria*, 85 Wn. App. 777, 784, 934 P.2d 1214 (1997) (holding the defendant constructively possessed a gun under his car seat with the barrel visible, but did not constructively possess a throwing star completely concealed by the seat).

State v. Davis, 182 Wn.2d 222, 234, 340 P.3d 820 (2014), Stephens, J., dissenting.

In the instant case, the evidence clearly demonstrates that the defendant exercised dominion and control over the premises of 1305 Crescent Street, where he was residing. The defendant testified he was living there from September 2016 to March 2017 and paid half of the rent. (RP 257, 268). The defendant testified that he was living at 1305 Crescent with just his mother and daughter. (RP 263). The defendant also testified that he had hoped the CI would stay at the house so he could collect rent from him because the defendant was in need of money. (RP 263). This evidence clearly indicates the defendant's dominion and control over the premises.

The defendant's daughter was 9 years old at the time. (RP 84). The defendant testified that he was overly protective of his daughter. (RP 267). Because of this, he set rules as to who could come to the residence, when they could come, and what they could and could not do. (RP 268). Consequently, the facts demonstrate that the defendant exercised dominion and control over his premises and, based on the totality of the circumstances, constructively possessed the firearms found on the premises. Because the defendant lived with his very young daughter, who

he was very protective of, and his elderly mother, a reasonable juror could conclude beyond a reasonable doubt that it was the defendant who possessed the firearms, not his daughter or mother.

Likewise, because of his over-protective nature with his daughter, a reasonable juror could also conclude beyond a reasonable doubt that it was the defendant who placed the firearms under the floorboards in the basement to protect his daughter from the firearms.

Furthermore, to the extent that guns are tools of the drug-dealing trade, the evidence of the defendant's delivery of methamphetamine and heroin, as well as his possession of heroin with intent to deliver, could very well make a reasonable juror conclude that it was the defendant and not his daughter or elderly mother who possessed the firearms.

The convictions for counts 5 and 7 are supported by sufficient evidence and should be affirmed.

B. There Was Sufficient Evidence for the Findings That Counts 3, 4 and 8 Occurred Within 1000 Feet of a School Bus Stop.

The defendant claims there was insufficient evidence for the school bus stop findings. However, Detective Giacomazzi testified that the distance between 1305 Crescent and the school bus stop location was 300 feet. (RP 241). The foundation for the determination of the distance was

also established by Detective Giacomazzi's testimony of his experience and training to establish distance visually. (RP 241-242). He has been through numerous trainings to establish distance visually through his time in the United States Marine Corps as a sniper, as well as his current position as a sniper with the Washington State Patrol SWAT team, a position he has held for 12 years. (RP 241-242). Importantly, this training and experience is connected to life and death visual determinations of distance.

Thus, there was sufficient evidence presented at trial that counts 3, 4 and 8 occurred within 1000 feet of a protected zone. This is not a case where the distance is at or anywhere near the outer limits of the protected zone. Moreover, given that the claim of insufficiency "admits the truth of the State's evidence in all inferences that can be drawn therefrom," the enhancement findings are supported by substantial uncontested evidence. *Salinas*, 119 Wn.2d at 201.

C. The Defendant Received the Effective Assistance of Counsel.

The defendant contends that he received the ineffective assistance of counsel, claiming that defense counsel made himself a witness and thereby created an actual conflict that adversely affected his representation. To establish a denial of effective assistance of counsel, the

claimant must demonstrate his attorney's performance was deficient and the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The first element is met by showing counsel's conduct fell below an objective standard of reasonableness. *In re Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). There is a strong presumption of reasonable representation, *Thomas*, 109 Wn.2d at 226, and when a claim of ineffective assistance of counsel can more easily be resolved on the basis of lack of prejudice, the court should do so. *Strickland v. Washington*, 466 U.S. 688, 80 L.Ed.2d 674, 104 S. Ct. 697 (1984).

The Sixth Amendment guarantees a criminal defendant's right to effective assistance of counsel, free from conflicts of interest. *State v. Regan*, 143 Wn. App. 419, 425, 177 P.3d 783, *review denied*, 165 Wn.2d 1012 (2008), citing *Strickland, supra*. An actual conflict is "a conflict that affected counsel's performance—as opposed to a near theoretical division of loyalties." *Regan*, 143 Wn. App. at 427-28, quoting *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L.Ed.2d 291 (2002). To show an adverse effect, a defendant must demonstrate that a plausible alternative defense strategy was available but was not pursued because of a conflict with the attorney's other interests. *Regan*, 143 Wn. App. at 428.

In the present case, the CI was asked by defense counsel if he remembered stating that he had used methamphetamine on February 21, the day of the delivery charged in count 1. (RP 208). The CI responded by saying he did not recall. (RP 208). On appeal, the defendant asserts that made Mr. Tibbits an impeachment witness as to a prior inconsistent statement under ER 607. However, the CI did not deny making the statement; he said he did not recall. Thus, impeachment evidence of the prior statement would not have been proper because it was not inconsistent. *State v. Allen*, 98 Wn. App. 452, 989 P.2d 1222 (1999).

Furthermore, the defendant was not convicted of count 1, the crime alleged to have occurred on February 21, 2017. (RP 355-430). Hence, any possible error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). This is even more apparent when considering that the CI admitted using methamphetamine on a continual basis approximately every other day. (RP 203). Therefore, the defendant has failed to demonstrate a conflict that affected defense counsel's performance. *Regan*, 143 Wn. App. at 427-28.

D. The Trial Court Did Not Violate the Defendant's Constitutional Right to a Unanimous Verdict by Failing to Give a Unanimity Instruction For Unlawful Possession of a Controlled Substance With Intent to Deliver Heroin as Charged in Count 8.

The State must elect to rely on a single act or the court must instruct the jury to agree unanimously on a single act when multiple acts could support a single charged crime. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled in part by State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). However, no election or unanimity instruction is needed if the defendant's acts were part of a continuing course of conduct. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). The conclusion of continuing course of conduct follows when the acts promoted one objective and occurred at the same time and place. *Petrich*, 101 Wn.2d at 571; *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996).

In *Love*, the police found 5 rocks of cocaine in Mr. Love's pocket, but no paraphernalia needed to use the cocaine. They also found 40 rocks of cocaine in Mr. Love's home, along with drug paraphernalia and a large amount of money. The State charged Mr. Love with a single count of possession with intent to deliver. At trial, Mr. Love contended that police

planted all of the cocaine. The jury found him guilty. On appeal, he assigned error to the court's failure to give an unanimity instruction. The Court of Appeals concluded that the possessions amounted to a continuing course of conduct because the single objective was to sell cocaine.

In the case at bar, the heroin in the coat pocket and on the scales in the defendant's bedroom occurred at the same time and place. To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a common sense manor. *Petrich*, at 571. Here, the defendant's acts were part of a continuing course of conduct of dealing drugs. As a result, there was no need for election or a unanimity instruction to be given.

E. First Degree Unlawful Possession of a Firearm is Not an Alternative Means Crime; Thus, There Was No Error in Not Providing Unanimity Instructions for Counts 5 and 7.

The defendant asserts on appeal that first degree unlawful possession of a firearm is an alternative means crime and that the failure to give unanimity instructions was error. However, given the recent ruling in *State v. Barboza-Cortes*, 194 Wn.2d 639, 451 P.3d 707 (2019), there was no such error and counts 5 and 7 should be affirmed.

F. Concessions to Assignments of Error.

The State concedes error as to the failure to give an unanimity instruction for count 9 and agrees that the conviction for count 9 should be reversed and remanded for a new trial.

The State concedes error as to the trial court imposing interest on legal financial obligations other than restitution, and the court should remand with instructions to modify the judgment and sentence and strike that provision. Given the remand, the sentencing court should totally strike out the \$200 criminal filing fee.

III. CONCLUSION

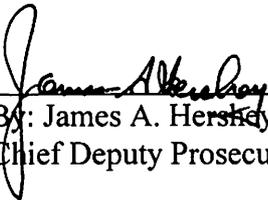
For the reasons set forth above, the defendant's convictions for counts 5 and 7 should be affirmed as they were supported by sufficient evidence. Further, counts 5 and 7 should be affirmed as there was no error due to a failure to give unanimity instructions because first degree unlawful possession of a firearm is not an alternative means crime. The special verdicts for the school bus stop enhancements for counts 3, 4, and 8 should be affirmed as they are supported by sufficient evidence. Because the defendant received the effective assistance of counsel, none of his convictions should be reversed based on a claim of ineffective assistance of counsel. The defendant's conviction for unlawful possession

of a controlled substance with intent to deliver heroin in count 8 should also be affirmed as the crime was a continuing course of conduct and no unanimity instruction was warranted.

DATED this 13th day of March, 2020.

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,

Plaintiff/Respondent,

vs.

MODESTO B. GONZALEZ,

Defendant/Appellant.

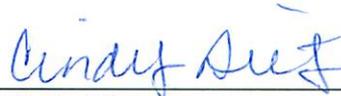
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Chelan Co. Superior Court No. 17-1-00140-7

DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 13th day of March, 2020, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 13th day of March, 2020.



Cindy Dietz
Legal Administrative Supervisor
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CHELAN COUNTY PROSECUTING ATTORNEY

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