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62706-6

NO. 62706-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRANDON SULLIVAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. In narcotics cases, probable cause to arrest is based on the totality of the facts and circumstances known to the officer at the time of the arrest, including the officer's training and experience. In this case, the officer who directed an arrest team to take the defendant into custody has over 20 years of law enforcement experience, specialized training in street-level narcotics crimes, and has made hundreds of drug-related arrests. The officer observed the defendant and his two companions in an area known for narcotics sales, engaged in behavior consistent with dealing drugs (three hand-to-hand transactions with lookouts), and being approached by known drug users. Based on the totality of the facts and circumstances, did probable cause exist to arrest the defendant for a drug-related crime?

2. There is sufficient evidence if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements beyond a reasonable doubt. Evidence of intent to deliver is generally circumstantial, must go beyond mere possession, and may be inferred from evidence of other drug transactions in temporal proximity to the charged offense and in areas known for high drug trafficking. Here, immediately

before his arrest, the defendant and his companions conducted three hand-to-hand transactions with known drug users in an area known for high narcotics sales. In a search incident to the defendant's arrest, police discovered 15 or more rocks of cocaine and currency, in various denominations, stuffed in both of his front pants pockets. Viewing the evidence and reasonable inferences in the light most favorable to the State, was there sufficient circumstantial evidence for a rational trier of fact to find that the defendant possessed a controlled substance with an intent to deliver?

3. Jury instructions not objected to become the law of the case. The State assumes the burden of proving the added element beyond a reasonable doubt. In this case, the State alleged that the defendant possessed a controlled substance in a protected zone with the intent to deliver it anywhere. Yet, the State proposed a jury instruction that required proof that the defendant *delivered* a controlled substance. Where, as here, the State produced no evidence of what the defendant had delivered, is dismissal of the protected zone enhancement with prejudice required?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By Amended Information, the State charged the defendant, Brandon Sullivan, with possession of cocaine with intent to deliver. CP 23. The State further accused Sullivan "at said time of being within 1000 feet of a school bus route stop." CP 23. Following a pre-trial CrR 3.6 hearing, the trial court determined that probable cause existed for Sullivan's arrest and admitted the cocaine.¹ CP 64. A jury found Sullivan guilty as charged, and found that the offense was committed in a protected zone.² CP 31-32. The trial court imposed a standard range sentence.³ CP 92, 94. Sullivan timely appeals.⁴ CP 75.

¹ The basis for the trial court's ruling is discussed below. See infra section C.1 of the State's brief.

² The State discusses the zone enhancement below. See infra section C.3 of the State's brief.

³ Initially, the trial court imposed a prison-based DOSA. CP 65-74. However, Sullivan was statutorily ineligible for a DOSA because of a prior conviction for a violent crime. See CP 72 (listing robbery in the second degree as one of Sullivan's prior convictions). The court subsequently re-sentenced Sullivan to 54 months, including the 24-month zone enhancement.

⁴ Two notices of appeal were filed. The second notice of appeal was a result of the re-sentencing that occurred on 8/18/09. By letter dated 8/21/09 this Court consolidated both appeals.

2. SUBSTANTIVE FACTS

On August 16, 2007, via video surveillance, Seattle Police Officer Donald Johnson monitored street crime outside the King County Courthouse. 2RP 1-2, 6.⁵ The location is a high drug area. 2RP 8. Because Officer Johnson has over 20 years of police experience, including training in narcotics enforcement, he is familiar with street narcotics transactions. 2RP 2-4.

Officer Johnson focused his attention on three men (the defendant, Dontaye Savare and Francis Gathauri), who were walking East on Third Avenue toward James Street. 2RP 11-13; CP 2; Ex. 1 (chapter 14).⁶ Sullivan wore a white T-shirt and jeans. 2RP 12. Savare had on a red baseball cap. 2RP 12. Gathauri had a blue baseball cap on backwards. 2RP 12; Ex. 1.

Sullivan held a small object in his closed hand, which he later dropped, picked back up and continued to hold in his fist. 2RP 13-14. Savare and Gathauri acted as lookouts. 2RP 14-15.

⁵ The verbatim report of proceedings consists of six volumes designated as follows: 1RP - 8/26/08 (pre-trial); 2RP - 8/28/08 (trial); 3RP - 9/2/08 (trial); 4RP - 9/26/08 (CrR 3.6 findings entered); 5RP - 11/4/08 (sentencing); 6RP - 6/18/09 (re-sentencing).

⁶ Officer Johnson videotaped all of the activities that gave rise to Sullivan's arrest. Mr. Sullivan's appellate counsel has designated the exhibit to this Court. The pertinent sections are chapters 14-16, beginning when the three men got into camera range and culminating in their subsequent arrests.

A woman approached, hugged Sullivan, and then exchanged currency for the item that Sullivan held. 2RP 15-16; Ex. 1 (chapter 14). Based on Officer Johnson's training and experience, he was certain that the brief, furtive, hand-to-hand contact had been a drug transaction. 2RP 16; Ex. 1 (chapter 14).

Next, Jacquelyn Jackson, a known drug user, along with an unknown male, approached Sullivan. 2RP 18. Jackson and Sullivan briefly conversed. 2RP 19. Jackson positioned the unknown male in such a way that he blocked other people's views. 2RP 18. Savare removed his cap, which is a common place that drug dealers store their narcotics, stepped into an alcove and then handed Jackson an item. 2RP 19. The unknown male paid Savare in change. 2RP 19.

Moments later, Angeline Cotter, another known drug user (wearing jeans and a black and white striped shirt), approached Sullivan. 2RP 19-20. Sullivan, Savare, Gathauri and Cotter crossed the street. 2RP 21. After Sullivan had gone into a market, Savare and Cotter made a hand-to-hand exchange. 2RP 21; Ex. 1 (chapters 14, 15).

Officer Johnson, who believed that he had just witnessed three drug transactions — all within 1000 feet of a school bus route

stop — in which Sullivan, Savare and Gathauri worked as a team, called for an arrest team. 2RP 21, 34-37, 74; Ex. 1 (chapter 16). Sullivan was arrested and in a search incident to his arrest police found 2 grams of cocaine and \$349.00. 2RP 48-49. Savare also possessed cocaine. 2RP 56; CP 1-2. The substance found on Sullivan was later analyzed by a state crime lab forensic scientist and found to contain cocaine. CP 30; 2RP 75.

Additional procedural and substantive facts will be discussed in the argument section to which they pertain.

C. ARGUMENT

1. POLICE HAD PROBABLE CAUSE TO ARREST SULLIVAN.

Sullivan challenges his conviction for possession of cocaine with intent to deliver. Specifically, he contends that he was arrested without probable cause and that the cocaine and the currency seized incident to his arrest should have been suppressed on that basis. Br. of Appellant at 14-23. This Court should reject Sullivan's claim. Based on the totality of the circumstances and Officer Johnson's training and experience, Johnson had probable

cause to arrest Sullivan, thereby rendering the subsequent search lawful.⁷

Unchallenged findings of facts are treated as verities on appeal, provided there is substantial evidence to support them.⁸

State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Id. This Court reviews de novo determinations of probable cause.⁹ State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007).

A warrantless arrest is justified if police have probable cause to believe that a person has committed or is committing a felony. RCW 10.31.100.

⁷ Sullivan contests only the lawfulness of the arrest; i.e., he does not claim that suppression is warranted if the evidence was seized incident to a lawful arrest.

⁸ Sullivan has not assigned error to any of the trial court's findings of fact following the suppression hearing.

⁹ Sullivan contends that the trial court erroneously placed the burden of establishing the legality of the arrest on the defense. Br. of Appellant at 13-14. The court stated, "I do believe that the defense has not met its burden as to challenge the legal basis to admit it in this particular case into (*sic*) evidence." 1RP 62. Although the record is unclear whether the trial court's comments referred to the burden of establishing probable cause to arrest or to challenging the admissibility of the video tape (exhibit 1), any error is harmless in light of the de novo standard of review.

"Probable cause exists when the arresting officer has 'knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed' at the time of the arrest." State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) (alteration in original) (quoting State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006)). In determining whether probable cause exists in a narcotics case, the Court must consider the totality of the facts and circumstances known to the officer at the time of arrest and take into consideration the special experience and expertise of the arresting officer. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996). "Probable cause requires more than suspicion or conjecture, but it does not require certainty." State v. Chenoweth, 160 Wn.2d 454, 476, 158 P.3d 595 (2007).

A determination of "probable cause is not negated merely because it is possible to imagine an innocent explanation for observed activities." Graham, 130 Wn.2d at 725 (quoting State v. Fore, 56 Wn. App. 339, 344, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990)). What might appear to an ordinary citizen to be innocent behavior may, to a trained police officer, indicate street sales of drugs. State v. Poirier, 34 Wn. App. 839, 842, 664 P.2d 7 (1983). In such cases, the police officer may believe

that he is observing criminal activity because of "the particular location, the reputation of one or more of the participants, the nature of the contact, and other actions of the parties, coupled with his experience and expertise." Id. at 842-43.

Here, based on Officer Johnson's expertise and observations, probable cause existed to conclude that Sullivan had committed a crime. See, e.g., State v. White, 76 Wn. App. 801, 804-05, 888 P.2d 169 (1995) (finding that the observing officer's training and experience coupled with his observation of White's actions throughout the contact between White's companion and the prospective buyer, which were consistent with the actions of a lookout in a drug transaction, provided probable cause to believe that White had committed a crime). Johnson had 20 years of experience as a law enforcement officer. 1RP 8; CP 62 (finding of fact 2). He had received specialized training pertaining to street-level narcotics crimes. 1RP 8; CP 62 (finding of fact 2). Johnson had investigated hundreds of drug-related crimes, made hundreds of drug-related arrests, and had come into daily contact with narcotics.¹⁰ 1RP 7-8; CP 62 (finding of fact 2).

¹⁰ The arresting officer's expertise in White was based, in part, on the officer having witnessed hundreds of narcotics transactions. White, 76 Wn. App. at 804 n.2.

The area that Johnson had monitored is well known for narcotics sales. 1RP 10; CP 62 (finding of fact 3). Usually, drug dealers work in teams; it is very common for narcotics transactions to include both the seller and a "lookout." 1RP 14, 29; 2RP 14-15; CP 62 (finding of fact 7); see also White, 76 Wn. App. at 804-05. Johnson had observed Sullivan walking with two other men (Savare and Gathauri) across the street from the courthouse. CP 62 (findings of fact 4, 5). Sullivan sat down on a ledge; he appeared to have had something small in his closed fist. 1RP 14; CP 62 (finding of fact 5). Sullivan dropped the item on the ground, picked it back up, and continued to hold it in his closed fist. Ex. 1 (chapter 14). Although Johnson could not discern what Sullivan had in his hand, based on his experience and his knowledge of the area, Johnson suspected that it was crack cocaine. 1RP 14; CP 62 (finding of fact 5).

In this case, it was the suspicious circumstances that surrounded the three transactions that supplied the basis for the probable cause. In the first exchange, an unknown female approached Sullivan and they briefly hugged. 1RP 28; CP 62 (finding of fact 6); Ex. 1 (chapter 14). The female then handed Sullivan paper currency in exchange for an unknown object that

Sullivan handed her. 1RP 15, 28-29; CP 62 (finding of fact 6); Ex. 1 (chapter 14). Sullivan never looked down during the exchange; rather, he had stared ahead over the female's shoulder. 1RP 14; CP 62 (finding of fact 5). The entire contact between Sullivan and the female lasted less than a minute. 1RP 16; Ex. 1 (chapter 14). This hand-to-hand transaction had been a "secretive exchange," during which Savare and Gathauri acted as lookouts. 1RP 14, 38-39; CP 62 (finding of fact 7).

Next, Jacquelyn Jackson, a known cocaine user, contacted Sullivan. 1RP 16-17; CP 62 (finding of fact 8). Jackson had been accompanied by a male, unknown to Officer Johnson, who Jackson positioned in front of Sullivan and Savare to block other people's views. 1RP 16-17; 2RP 17-18; CP 63 (findings of fact 8, 9). Savare gave an unknown object (that appeared to Officer Johnson to be a rock of cocaine) to Jackson and then accepted payment in coins from the unknown male.¹¹ 1RP 17, 20; CP 63 (finding of

¹¹ When crack cocaine is carried on the street, it can be a "chip," which is about one half of the size of a tic-tac to as big as a baseball. 1RP 38.

fact 8). The entire transaction had occurred in less than a minute.¹²
1RP 17; CP 63 (finding of fact 8); Ex. 1 (chapters 14-15).

Sullivan, Savare and Gathauri walked down the street together. CP 63 (finding of fact 10). A woman (Angeline Cotter), known to Officer Johnson as a drug user, contacted Sullivan. CP 63 (finding of fact 10). After a brief conversation, everyone crossed the street, and after Sullivan had gone into a market, a hand-to-hand exchange occurred between Savare and Cotter. Ex. 1 (chapter 15); 1RP 20; CP 63 (finding of fact 10).

Here, the totality of the circumstances — Sullivan's, Savare's and Gathauri's suspicious, furtive and very brief contacts with known drug users, Officer Johnson's training and experience and his knowledge that the transactions had occurred in an area known for high levels of narcotics trafficking — supported Officer Johnson's belief that probable cause existed to arrest Sullivan, Savare and Gathauri for drug related charges. 1RP 21, 40, 63; CP 63-64 (findings of fact 10, 11; conclusion of law). See, e.g., Fore, 56 Wn. App. 339, 343-45.

¹² As Savare exchanged what appeared to be rock cocaine with Jackson, Sullivan was doing "head nods" with other people on the street. 1RP 31. Head nods are very common nonverbal means by which a drug dealer communicates that he has narcotics. 1RP 31.

In Fore, a police officer used binoculars to observe three transactions in which the defendant and another man exchanged small plastic bags of what appeared to be marijuana with passing motorists for folded currency. Fore, 56 Wn. App. at 343-44. The court in Fore noted, "the suspicious circumstances surrounding the exchanges, not the officer's ability to identify the substance, constituted the primary basis for the probable cause determination." Id. at 345.

Although the facts in this case are not identical to the facts in Fore, the differences are legally insignificant; i.e., the fact that Officer Johnson never saw an identifiable drug pre-arrest does not defeat probable cause. The probable cause determination in Fore did not turn on any one factor. Instead, the court considered the totality of the circumstances, including the officers' extensive narcotics training and experience, to determine whether probable cause existed. The trial court applied the same analysis in this case and correctly determined that probable cause existed to arrest Sullivan. This Court should affirm the trial court's denial of Sullivan's motion to suppress.

Sullivan contends that the facts in this case are "somewhat similar" to the facts in Poirier. Br. of Appellant at 19.¹³ In that case, police saw the defendant and another man arrive at a parking lot and exchange items that appeared to be white packages or envelopes. Poirier, 34 Wn. App. at 842. On appeal, Division Two of this Court held the facts as found by the suppression judge inadequate to support a probable cause determination. Id. at 842-43. The Court noted that had the suppression judge's findings established that (1) either party was known to the police officer, or (2) the specific parking lot was known as a high narcotics area, or (3) the envelopes exchanged were particularly distinctive or characteristic of packaged drugs, or (4) either party acted in a suspicious or furtive manner, those findings might well have supported a probable cause determination. Id. at 843.

Furthermore, the Court stated that the evidence adduced at the

¹³ It appears that Mr. Davis, Mr. Sullivan's counsel on appeal, merely "cut and pasted" most of the probable cause argument section of his brief in this case from his brief in State v. Alokolaro, 131 Wn. App. 1063, 2006 WL 618883, (unpublished 2006). In Alokolaro, the defendant challenged whether *Officer Elias* had probable cause to arrest him for *drug loitering*. Here, Mr. Davis writes extensively about whether *Officer Elias* (not an officer in the instant case) had probable cause to arrest Sullivan for *drug loitering* (a charge unrelated to the instant case) and he cites to RP1/26/05 (a verbatim report of proceedings that precedes the date of Mr. Sullivan's offense by more than two years). See Br. of Appellant at 17-19. In addition, Mr. Davis's attempts to synthesize or distinguish case law are almost identical. Compare Br. of Appellant at 19-22 with Br. of Appellant in Alokolaro at 18-24 and Alokolaro 2006 WL 618883 at *3-4.

suppression hearing "arguably would support different and stronger findings, particularly as regards the officers' experience. . . ." Id. at 840-41.

In this case, the facts as found by the suppression judge established that (1) Officer Johnson knew that two of Sullivan, Savare and Gathauri's contacts are narcotics users, *and* (2) the area in which the exchanges occurred is known for high drug trafficking, *and* (3) the manner in which Sullivan held an unknown item in his closed fist is consistent with how drug dealers hold their drugs,¹⁴ *and* (4) the manner in which the secretive exchanges occurred, with people acting as lookouts, is consistent with how drug dealers transact business. CP 62-63 (findings of fact 3, 5-10). In addition, the findings by the suppression judge highlight Officer Johnson's considerable training and experience. CP 62 (finding of fact 2). Accordingly, Sullivan's claim fails.

¹⁴ Savare kept taking off his red baseball cap to look inside it. Ex. 1 (chapters 14, 15). It is common for drug dealers to store crack cocaine in the lining of their hats. 2RP 19.

2. SUFFICIENT EVIDENCE SUPPORTS THE VERDICT THAT SULLIVAN POSSESSED WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE.

Sullivan next challenges the sufficiency of the evidence, contending that "bare possession" absent other facts and circumstances not present in this case is insufficient to prove intent to deliver. Br. of Appellant at 24. This claim fails. Based on the three transactions captured on the surveillance video, and the amounts of cocaine and cash that Sullivan possessed, a rational trier of fact could infer Sullivan's intent.

There is sufficient evidence if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). This Court draws all reasonable inferences in the State's favor and interprets them most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Convictions for possession with intent to deliver are highly fact specific. State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). Because of the nature of the charge, evidence of intent to deliver is usually circumstantial. State v. Davis, 79 Wn. App. 591, 594, 904 P.2d 306

(1995). Circumstantial evidence is no less reliable than direct evidence. Brown, 68 Wn. App. at 483.

However, evidence of an intent to deliver must be sufficiently compelling that the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Therefore, the intent to deliver must logically follow as a matter of probability from the evidence presented — evidence that goes beyond mere possession. Davis, 79 Wn. App. at 594. For example, evidence of other drug transactions in temporal proximity to the charged offense is relevant to prove intent to deliver. State v. Thomas, 68 Wn. App. 268, 273-74, 843 P.2d 540 (1994) (officers' observation that the defendant appeared to be selling drugs in three separate incidents before his arrest tended to make it more probable that the defendant intended to sell the cocaine he possessed when he was arrested). Intent to deliver may also be inferred from possession of significant amounts of narcotics; however, generally where intent to deliver was inferred from the possession of a quantity of narcotics, at least one additional factor was present. See Brown, 68 Wn. App. at 484 & n.5 (citing, among other cases, State v. Llamas-Villa,

67 Wn. App. 448, 836 P.2d 239 (1992) (possession of cocaine, heroin, \$3,200, and a handgun in a storage locker supported the inference of intent);¹⁵ State v. Mejia, 111 Wn.2d 892, 894-96, 766 P.2d 454 (1989) (finding that 1 ½ pounds of cocaine in addition to an informant's tip and a controlled buy supported an inference of intent); and State v. Lane, 56 Wn. App. 286, 297, 786 P.2d 277 (1989) (holding that one ounce of cocaine (usually sold by the one-eighth ounce), a large amount of cash, and scales supported the inference of intent)).

Under the specific facts of this case, there was sufficient evidence from which the jury could infer Sullivan intended to sell the cocaine that he possessed. Sullivan was in an area known for high drug trafficking. 2RP 8. Just before Sullivan, Savare and Gathauri were arrested, the men had engaged in three hand-to-hand transactions in which the buyer exchanged cash for what appeared to be narcotics and one or more persons acted as lookouts. Ex. 1 (chapters 14, 15); 2RP 13-21. When arrested, Sullivan possessed 15 - 20 rocks of cocaine, weighing 2 grams.

¹⁵ Brown cited Llamas-Villa and stated that the possession of cocaine, heroin and \$3,200 was "combined with an officer's observations of deals," which together supported an inference of intent to deliver; however, the published opinion in Llamas-Villa does not include any facts concerning officer observations. Compare Brown, 86 Wn. App. at 484 with Llamas-Villa, 67 Wn. App. at 450-54.

2RP 49; 3RP 30. One of Sullivan's companions also had narcotics in his possession and it is very common for street level drug dealers to work in teams, as Sullivan, Savare and Gathauri appeared to have been doing. 2RP 15, 56; Ex. 1 (chapters 14, 15). Sullivan also had \$349 cash between his two front pockets (some of which he was seen receiving from the female who first transacted business with him). 2RP 48; Ex. 1 (chapter 14). Viewing the evidence and reasonable inferences in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find Sullivan guilty of possession of cocaine with intent to deliver.¹⁶

3. THE STATE CONCEDES THAT FOR PURPOSES OF THE SENTENCE ENHANCEMENT, IT PRESENTED INSUFFICIENT EVIDENCE.

Sullivan contends that, for purposes of the sentence enhancement, the to-convict instruction contained an otherwise unnecessary element for which there was insufficient evidence. The State concedes that Sullivan is correct.

¹⁶ Should this Court disagree and conclude that the evidence of an intent to deliver was insufficient, the Court should reverse the judgment and remand for entry of an amended judgment of guilty of possession of a controlled substance. See Davis, 79 Wn. App. at 592 & 596.

Jury instructions, when not objected to, become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to-convict" instruction. Hickman, at 102 (citing State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)). Further, a defendant may then assign error to elements added under the law of the case doctrine, and that assignment "may include a challenge to the sufficiency of evidence of the added element." Hickman, at 102.

In the instant case, the State alleged in the amended information that Sullivan committed the crime of possession with an intent to deliver a controlled substance and "at said time of being within 1000 feet of a school bus route stop." CP 23. Based on the charging document, the jury should have been instructed that if it found Sullivan guilty of possession with intent to deliver, it next needed to determine whether Sullivan possessed the controlled substance within 1000 feet of the school bus route with the intent to deliver it at any location. See State v. McGee, 122 Wn.2d 783, 864 P.2d 912 (1993); WPIC 50.60. Instead, the State proposed an instruction that said:

If you find the defendant guilty of possessing with intent to deliver a controlled substance, it will then be your duty to determine whether or not the defendant *delivered the controlled substance* to a person within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location.

...
If you find from the evidence that the state has proved beyond a reasonable doubt that the defendant *delivered the controlled substance* to a person within a thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance, it will be your duty to answer the special verdict "yes".

CP 54; 3RP 2 (emphasis supplied).

The State concedes that under Hickman and the law of the case doctrine, it bore the additional burden of proving delivery of a controlled substance, not merely possession with an intent to deliver. See RCW 69.50.410(1). The jury's verdict notwithstanding, the State did not meet its burden.¹⁷

¹⁷ The jury returned a special verdict, as follows:

We, the jury, find the defendant BRANDON SULLIVAN guilty of the delivering (sic) a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance.

CP 31.

In determining whether there is sufficient evidence to prove the added element, the reviewing court inquires "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." Hickman, 135 Wn.2d at 103 (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); and Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), rehearing denied, 444 U.S. 890 (1979)). Even under this deferential standard, the State cannot prevail here because the evidence that Sullivan delivered a controlled substance is based on Officer Johnson's conjecture, at best. And, "the existence of a fact cannot rest upon guess, speculation, or conjecture." State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

Generally, a laboratory test or chemical analysis is not required to uphold a conviction for delivery of a controlled substance. Cf. Colquitt, 133 Wn. App. at 796 (stating that a chemical analysis was not required to uphold a conviction for

possession of a controlled substance). However, some circumstantial evidence in addition to lay testimony may be sufficient to establish that the defendant delivered a controlled substance. See, e.g., State v. Hernandez, 85 Wn. App. 672, 678-82, 935 P.2d 623 (1997) (finding sufficient evidence that the defendant delivered a controlled substance where the officers provided detailed testimony about things such as (1) their expertise in identifying drugs and drug-sale behaviors, (2) standard drug prices, (3) their observations of behavior consistent with drug sales, (4) the drug-using behavior of the persons contacting the defendant, (5) the area in which the defendant was observed being known for high drug activity, (6) delivery of material consistent with the material found on the defendant, and (7) delivery of money in amounts consistent with drug sales.).

In this case, unlike in Hernandez, the State did not present any circumstantial evidence to support or corroborate Officer Johnson's conjecture. Despite Officer Johnson's familiarity with rock cocaine, he said that was unable to see exactly what was in

Sullivan's hand. 2RP 2-4, 13. Johnson said that based on his training and experience, he *suspected* that Sullivan had drugs in his hand. 2RP 13-14. But, at no time, did Johnson see narcotics in Sullivan's hand. 2RP 28. Thus, the State supported the added element with conjecture – not proof beyond a reasonable doubt. As a result, this Court should remand this case with instructions to the trial court to strike the sentence enhancement and re-sentence accordingly.¹⁸ See Hickman, 135 Wn.2d at 103-04 (reiterating that dismissal with prejudice is the remedy following reversal for insufficiency of the evidence).

D. CONCLUSION

Because the police had probable cause to arrest Sullivan, and because sufficient evidence supports the jury's verdict of possession of a controlled substance with an intent to deliver, the State respectfully asks this Court to affirm the judgment. However, because the State provided insufficient evidence to prove the

¹⁸ Because the State concedes that it provided insufficient proof of delivery of a controlled substance, this brief will not address Sullivan's remaining claims vis-à-vis the protected zone enhancement.

added element of delivery beyond a reasonable doubt, the State further requests that the Court remand the case and instruct the trial court to strike the sentence enhancement and re-sentence Sullivan accordingly.

DATED this 12 day of January, 2010.

Respectfully submitted,

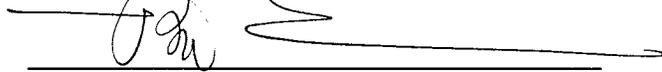
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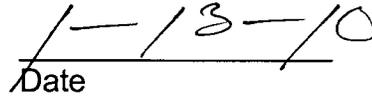
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SULLIVAN, Cause No. 62706-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly
Done in Seattle, Washington


Date