

No. 311325

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

FILED
May 23, 2013
Court of Appeals
Division III
State of Washington

DIVISION III

STATE OF WASHINGTON,

Appellant,

vs.

RICHARD LAMOUNT PEARSON,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE RUTH E. REUKAUF, JUDGE

BRIEF OF APPELLANT

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmes
Deputy Prosecuting Attorney
WSBA #18364
Attorney for Respondent
211, Courthouse
Yakima, WA 98901
(509) 574-1200

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that, for the purposes of the sentencing enhancement found at RCW 69.50.435(5), insufficient evidence supported the jury's special verdict that the delivery of a controlled substance occurred within 1000 feet of a school bus stop. **(CP 48)**

2. The trial court further erred in vacating the jury's special bus stop verdict, and sentencing the defendant Richard Pearson to a standard range sentence. **(CP 48)**

3. The trial court erred in concluding that the State has the burden of proving that school bus stops are currently being utilized to support the sentencing enhancement. **(CP 48)**

II.

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Whether a school zone map created by a county geographic information services department is sufficient evidence of the location and proximity of school bus stops, where the county is the repository of such information, and such information is annually updated by the State and local school districts?
2. Whether a trial court improperly vacated a jury's special verdict, where substantial evidence was admitted at trial, in the form of a GIS map which showed that there were seven school bus stops within 1000 feet of the location where the delivery of a controlled substance occurred?
3. Whether the State has the burden of proving that school bus stops were currently being used, based upon testimony from of the local school district, in order to impose the 24-month sentencing enhancement?

III. STATEMENT OF FACTS

Detective Horbatko of the Yakima Police Department began an investigation into suspicious late night foot traffic at a tire store in the 1300 block of North First Street in Yakima. The detective was aware that there were allegations that methamphetamine and stolen property were being sold from that property. **(RP 86-87)**

After some surveillance of the business, the detective enlisted the aid of a confidential informant, who attempted a controlled buy on September 22, 2011. **(RP 88-89; 92-97)** She was able to purchase 16 pills, consisting of Vicodin or hydrocodone, as identified by the detective, using money provided by the detective. **(RP 102-03)**

Based upon the controlled buy of September 22nd, as well as other operations conducted by the police, a search warrant for the business was executed on October 10, 2011. The

defendant, Richard Pearson, was present at the business when the warrant was executed. **(RP 105)**

Alyse Guthrie testified at trial that prior to the controlled buy of September 22, 2011, she had been hanging around the tire store for several days. She was acquainted with “Rick”, who resided in a trailer on the premises, whom she identified as the defendant, Mr. Pearson. She purchased the pills directly from Mr. Pearson in the trailer. **(RP 126-28; 151)**

At the time that the search warrant was executed, Mr. Pearson was arrested by Detective Posada of the Yakima Police Department. Detective Posada also found pills, dominion paperwork, a digital scale, as well as a pistol during a search of the trailer. **(RP 160-63)** The pills were packaged for sale. **(RP 171-72)**

A laboratory analysis of the pills indicated that the pills sold by Mr. Pearson to the informant included hydrocodone. **(RP 190)**

Mr. Michael Martian testified for the prosecution. He is the director of Geographic Information Systems, or GIS, for Yakima County. GIS is the keeper of the digital legal map library for the county and all its departments. Property lines, zoning or flood control zones or hundreds of other “layers” can be digitally imposed over an aerial photography map, and are kept as public records by the County. **(RP 217-18)**

One of the layers maintained by GIS is one showing school bus stops and school properties. The bus stop maps are created using information which is provided yearly from each school district in the county, which is submitted to the State and then to the county. **(RP 219)** Employing software which uses the coordinates of the bus stops, an arc with a radius of 1000 feet can be superimposed to show what would be within that arc or circle. **(RP 220)**

For Mr. Pearson’s case, Mr. Martian created a map using 1309 North First Street as the center point, and demonstrating the location of school bus stops within 1000 feet of that

address. The map was admitted at trial without objection. (**RP 221; Ex. 4**)

While discussing proposed jury instructions with counsel, the court observed that it was unsure sufficient evidence support the giving of the school bus stop enhancement instruction:

THE COURT: Actually, the objection I was anticipating on that that never arose is that we don't have anybody from the school district to testify whether that was in fact an operational school bus stop on the date in question. And yet, nobody raised it, you know, there are the times it becomes very hard for me to keep my mouth shut up here and yet that's what I'm supposed to do. We didn't really specifically address that on the halftime motion because at least there's familiarity that at times even though a school bus stops are

designated as such they're not necessarily utilized
as such at times because of need.

...

THE COURT: But here's your problem, Mr. Camp, at the beginning of the school year when he marks those on there – this is the first time I've ever seen a school official not called in as to a school zone enhancement for that precise reason because even though bust stops are designated as such at the beginning of the school year, if you talk to a school official, (inaudible) from transportation, they will tell you that at times those stops are not utilized because of a need not being there and they're bypassed. Now, the question becomes does that get him out of the woods because it's still, quote unquote, a school bus stop.

MR. CAMP: Your Honor, I spoke with Mr. Martian and they create these and they aren't changed until a new one is sent and that's –those are-and just because no kid shows up at that one school, it's still designated –the law is that it is a school bus stop. It's not that kids use it. If it has been designated as a school bus stop, the law states that you cannot sell drugs or -

(RP 248-49)

The court and counsel continued to discuss the enhancement issue, the State taking the position that pursuant to RCW 69.50.435, a map prepared by any municipality, school district or county, among others, which depicts the locations of school bus stops, is admissible, and would constitute *prima facie* evidence of those locations. **(RP 253-60)**

The court ultimately decided to give the bus stop enhancement special verdict form to the jury:

THE COURT: . . . So I don't even know if we've got a proper instruction here, so I guess I'm where I'm at. I will allow this to be argued to the jury with the understanding even if they jury comes back with yes on a special verdict, if I find that the evidence and I'm doing this simply to keep this case moving forward at this point. I will be withdrawing it even if they write yes on there if there's not a basis.

(RP 260)

The jury convicted Mr. Pearson, and also found that he delivered a controlled substance to a person within one thousand feet of a school bus stop. **(CP 6; CP 7; RP 287-92)**

The court provided counsel an opportunity to brief the school bus stop issue. **(CP 23-30; CP 31-33)** The court then ruled:

THE COURT: All right. I'm not satisfied that the State has met their legal foundation on a

lot of levels, quite bluntly. What-and I-quite honestly I went back and got a CD of –well, it’s actually the entire trial but the portion I listened to again was Mike Martian’s testimony that had been brought up during trial and there’s no question he’s the custodian of records. There’s no question that the map that was entered, all perfectly legitimate but when you read about the enhancement statute, and I guess for purposes of my ruling today, I want to point out the legislature put the 24-month enhancement into play for one reason and one reason only. They don’t want people dealing drugs near schools, anyplace children are going to congregate. That’s the legitimate reason for the enhancement. When the State simply professes that they can put a map in that has school bus stops marked on it that was submitted-and quite honestly I don’t even know who submitted it.

...

. . . I think my comments were during the trial, these school bus stops even though designated as such sometimes are – again, they’re not being utilized because the populations change all the time. Children in some neighborhoods will move out. There’s a need, you know, sometimes it-so I think the State has to take the additional step and I’m just thrilled to have Mr. Camp take this up to the Court of Appeals because I feel that I’m right on this one.

(7-27-12 RP 3-4)

The court entered written findings and conclusions of law consistent with its oral ruling. **(8-17-12 RP 21; CP 34-36)** Mr. Pearson was sentenced to a standard range of 14 months in confinement, the court refusing to impose the 24-month enhancement. **(CP 37-44)** The State timely cross-appealed.

(CP 53-66) The issues raised on cross review remain after Mr. Pearson's direct appeal was abandoned.

I V. STANDARD OF REVIEW

In analyzing a trial court's decision to vacate a jury verdict, the court may only determine whether there was 'substantial evidence' tending to support all necessary elements of the crime. State v. Tinajero, 154 Wn. App. 745, 749, 228 P.3d 1282 (2009), *citing* State v. Stiltner, 80 Wn.2d 47, 55, 491 P.2d 1043 (1971).

V. ARGUMENT

A. **Substantial evidence supported the jury's special verdict, and the court erred in vacating it.**

An appellate court evaluates a trial court's decision to vacate a jury verdict by first reviewing the elements of the crime charged. Tinajero, 154 Wn. App. at 749. Further, a trial

court's decision to vacate a verdict must be based upon only a determination whether or not the verdict was supported by "substantial evidence". Id.

"[W]hether the evidence is sufficient to submit the issue to the jury is a question of law for the court and no element of discretion is involved." State v. Basford, 76 Wn.2d 522, 530, 457 P.2d 1010 (1969), *quoting* State v. Zorich, 72 Wn.2d 31, 34, 431 P.2d 584 (1967). The court "must assume the truth of the state's evidence and view it most strongly against the defendant and in a light most favorable to the state." State v. Randecker, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971), *quoted by* Tinajero, 154 Wn. App. at 751. Additionally:

The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon,

does not justify the court's setting aside the jury's verdict.

Id.

Stated another way, the court need only be "satisfied that there is 'substantial evidence' to support either the state's case, or the particular element in question." Id.

Here, the issue to be decided by the jury was whether the delivery of the pills occurred within 1000 feet of a school bus stop. As noted, the court found that the map prepared by Mr. Martian showed that there were, in fact, *seven* bus stops within 1000 feet of the tire store. The court also found that Yakima County GIS was the repository, or "keeper" of the digital map layers, and that the bus stop locations were updated yearly.

(CP 45-47) Based upon the argument below, there was substantial evidence upon which the jury could determine that the delivery occurred within 1000 feet of *a* bus stop.

B. The plain language of the enhancement statute does not require testimony from

**school district representatives in order to
verify the location of bus stops.**

In interpreting a statute, and ascertaining the intent of the legislature, a reviewing court looks first to the plain language of the statute. State v. Bunker, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010) (citations omitted). The plain meaning of a statute may be discerned from that the Legislature has said in a statute, and related provisions. Id.

Only if a statute is ambiguous, or susceptible to two or more reasonable interpretations, is the legislative history or circumstances surrounding its enactment considered, in order to determine legislative intent. Seattle v. Winebrenner, 167 Wn.2d 451, 195 P.3d 86 (2009); State v. Weaver, 161 Wn. App. 58, 61-62 (2011).

Mr. Pearson was charged with violating RCW 69.50.401, by delivering a controlled substance. The penalty enhancement for doing so within 1000 feet of a school bus stop is found at RCW 69.50.435(1)(c).

As the State cited below:

. . . a map produced or reproduced by any municipality, school district, county, . . . for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for a school, school bus route stop . . . or a true copy of such a map, shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas if the governing body . . . has adopted a resolution or ordinance approving the map as the official location and record of the location . . . (of the) school bus route stop . . . This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or testimony to establish any element of the offense. . . This section shall not be construed as precluding the use or admissibility of

any map or diagram other than the one which has been approved by the governing body of a . . . county . . . if the map or diagram is otherwise admissible under court rule.

RCW 69.50.435(5)

As the State conceded below, there is no resolution or ordinance pertaining to the GIS bus stop maps, but it is clear from the plain language of the latter provision of the statute that it would allow the State to rely upon any admissible map or diagram, and would not preclude the digital map layers store and kept digitally by GIS, in proving the proximity to a bus stop. Indeed, digital maps can be used to establish distances beyond a reasonable doubt. State v. Jones, 140 Wn. App. 431, 166 P.3d 782 (2007).

The trial court's conclusion that something more, an "additional step to show that the bus stops are being utilized" is simply not supported by either the plain language of the statute

or the legislative history. In fact, the legislative intent was expressed as follows:

The legislature finds that a large number of illegal drug transactions occur in or near publicly owned places used for recreational, educational, and cultural purposes. The legislature also finds that this activity places the people using these facilities at risk for drug-related crimes, discourages the use of recreational, educational, and cultural facilities, blights the economic development around these facilities, and increases the general level of fear among the residents of the areas surrounding these facilities. The intent of the legislature is to allow local governments to designate a perimeter of one thousand feet around publicly owned places used primarily for recreation, education, and cultural activities as drug-free zones.

1996 Session Laws, C. 14.

The case law relied upon by the court also does not require evidence of current use by a school district. The Supreme Court held that RCW 69.50.435 is not unconstitutionally vague, nor does it violate equal protection, in State v .Coria, 120 Wn.2d 156, 175, 839 P.2d 890 (1992).

While it is true that a representative of the Yakima School District testified in that case as to the creation of the master map which is submitted to the Superintendent of Public Instruction, the sufficiency of the evidence to support the enhancement was not at issue, and the decision there does not preclude the State's use of the digital map layers.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime 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

reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

The trial court here erroneously vacated the jury’s special verdict, since substantial evidence supported it.

**VI.
CONCLUSION**

For all the foregoing reasons, this court should reverse the trial court's order vacating the special sentencing enhancement verdict, and remand this matter to the superior court for resentencing and imposition of the sentencing enhancement.

Respectfully submitted this 23rd day of May, 2013.

/s/ Kevin G. Eilmes
WSBA 18364
Deputy Prosecuting Attorney
Yakima County Prosecuting Attorney
128 N. 2nd St., Room 211
Yakima, WA 98901
Telephone: (509) 574-1200
FAX: (509) 574-1201

kevin.eilmes@co.yakima.wa.us

Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date
I served copies of the foregoing upon the Respondent, pro se,
via U.S. Mail.

Mr. Richard Lamont Pearson
DOC #239125
702 E. 3rd St.
Cle Elum, WA 98922

Dated at Yakima WA this 23rd day of May, 2013.

/s/ Kevin G. Eilmes