

71305-1

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NO. 71305-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JORGE A. BENITEZ,

Appellant.

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COURT OF APPEALS
DIVISION I
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BRIEF OF RESPONDENT

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I. ISSUES

1. Was sufficient evidence presented to support the jury finding beyond a reasonable doubt that defendant or an accomplice was armed with a firearm at the time of the offense?

2. Was the jury correctly instructed on the applicable law allowing the parties to argue their theories of the case?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

On November 4, 2012, Kathleen Armstrong arrived for work as the night laundry and front desk clerk at Extended Stay America in Bothell. Her shift was from 11:00 p.m. to 7:00 a.m. Jorge Antonio Benitez, defendant, had been staying at Extended Stay for a few days with his girlfriend, Chelsea. Initially, defendant was staying in a room on the second floor, over the weekend he moved to room 125 on the first floor. On November 4, 2012, around 9:00 p.m., defendant moved to room 309 on the third floor. Room 125 should have remained vacant. RP¹ 89-92, 96-98, 102-103, 214-216.

¹ RP designates the continuously paginated Verbatim Report of Proceedings for November 18—20, 2013. Other Verbatim Reports of Proceedings are indicated by inclusion of the date, e.g., RP (10/28/13).

When Armstrong arrived at 11:00 p.m. she observed defendant and Chelsea come out of room 125 and get on the elevator. Later, she heard Chelsea talking on the phone giving someone directions to Extended Stay. She observed Chelsea let two people into the hotel and take them to room 125. A short while later Armstrong observed defendant get out of the elevator and go into room 125. She called the Bothell Police to report the suspicious activity. The police arrived in about ten minutes, just after midnight. RP 92-95, 100-101, 103-104.

Officers Kerzman and Martin were dispatched to the Extended Stay. They contacted Armstrong at the front desk and were provided a key for room 125. The officers went to room 125 and could hear people talking inside the room. They knocked on the door a couple times and announced, "Bothell Police, open the door." They heard movement inside the room and used the key to gain entry. Inside the room they observed drug paraphernalia on the table and a male and a female sitting on the couch. These individuals were later identified as Aaron Singleton and Abigail Woods. The officers heard footsteps moving away from the central area of the room. Officer Kerzman stayed with Singleton and Woods while Officer Martin pursued the footsteps into the bathroom

where he located defendant facing the toilet and heard something hit the water. Officer Martin observed a brown substance in the toilet that "was not likely produced by a human being." The item was suspected to be heroin and was retrieved. RP 31, 33-40, 53-55; RP (10/28/13) 30-35, 38-40, 42-44.

Defendant was handcuffed and seated on the foot of the bed. Defendant was advised of his constitutional rights and stated he understood and waived those rights. After Singleton and Woods were identified and interviewed it was determined that they would be released. Singleton wanted to retrieve his belongings and was brought back into the room. Officer Martin asked defendant which bag was Singleton's and he replied, "... the one with the gun in it." Defendant said that Singleton had stolen the gun from the military and brought the gun with him. The bag had been on the couch next to Singleton when Officers Kerzman and Martin entered the room. Defendant had \$656 in his wallet. RP 39, 41-47, 55, 67, 72-75, 78-79, 225-226; RP (10/28/13) 45-47, 50, 52.

Bothell Police Detective O'Bryant arrived at Extended Stay and was advised what had happened. He contacted the Snohomish County Regional Drug Task Force and Detective Rucker was assigned to the case. Detectives O'Bryant and Rucker

interviewed defendant at the Bothell Police Department around 6:00 a.m. on November 5, 2012. The interview lasted about 45 minutes. Initially defendant claimed that he was at room 125 to purchase narcotics, but later admitted that he was selling. Defendant said that Singleton was working for him as a runner. Defendant would supply the runner who would then distribute the narcotics to the buyers. Defendant said that another person named "Tori" also worked for him as a runner. Defendant said there was a safe in room 125 that belonged to Tori. RP 109-112, 115-116, 122, 134, 184-186, 188-190, 198-199, 202-203.

After the interview of defendant Detective Rucker obtained a search warrant for rooms 125 and 309 at Extended Stay. A loaded .40 caliber Glock handgun with two magazines and fifteen bullets were found in Singleton's bag in Room 125. The firearm was sent to the crime lab for fingerprinting and Singleton's left thumb print was found on the firearm. Two items of brown substance were found on the table in room 125—the item retrieved from the toilet and a separately bagged amount. They were sent to the crime lab for testing and the lab confirmed the substances were heroin and that they weighed 8.05 grams and 3.16 grams respectively. A black suitcase containing a safe was found in room 125. Other

drugs and drug paraphernalia were located in both rooms 125 and 309. Exhibit 2; RP 56-58, 142-149, 156-173, 182-183, 196-197, 201-202.

Defendant admitted that the heroin found in room 125 was his and that he provided heroin to others. Defendant said that he knew there was a gun in Singleton's bag because the first time they met Singleton had shown him the gun and told defendant that he had a permit for the gun. RP 220-223, 229, 231-235, 237, 238-241, 255-256.

B. PROCEDURAL HISTORY.

Defendant was charged with Possession of a Controlled Substance with Intent to Manufacture or Deliver while defendant or an accomplice was armed with a firearm.² CP 121-122.

The case proceeded to trial on October 28, 2013. A mistrial was declared on October 29, 2013. RP (10/28/13) 2-197. The case was reset and trial commenced on November 18, 2013. On November 20, 2013, the jury found defendant guilty of the crime Possession of a Controlled Substance with Intent to Deliver and returned a special verdict that defendant or an accomplice was

² Count 2, Unlawful Involvement of a Person Under Eighteen in a Transaction to Manufacture, Sell, or Deliver a Controlled Substance, was dismissed on defense motion at the close of the State's case. RP 209-211, 230-231.

armed with a firearm at the time of the commission of the crime.
CP 19, 20; RP 331-334.

Defendant timely appealed. CP 2.

III. ARGUMENT

A. SUFFICIENCY OF THE EVIDENCE.

Defendant argues the evidence was insufficient to support the special verdict finding that he or an accomplice was armed with a firearm at the time of the offense. Brief of Appellant 6-9.

1. Legal Standard.

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines 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. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency

admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. O'Neal, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The 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, 415-416, 824 P.2d 533 (1992).

2. Sufficient Evidence Was Presented To Support Finding Beyond A Reasonable Doubt That Defendant Or An Accomplice Was Armed With A Firearm At The Time Of The Offense.

Under RCW 9.94A.825:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, ... if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

To establish that a defendant or an accomplice was armed for purposes of the sentencing enhancement, the State must prove that a weapon was easily accessible and readily available for use and that there was a nexus or connection between the defendant or an accomplice, the crime, and the weapon. State v. Eckenrode, 159 Wn.2d 488, 490-491, 150 P.3d 1116 (2007); State v. Easterlin, 159 Wn.2d 203, 206, 149 P.3d 366 (2006).

Here, there was evidence that defendant possessed the heroin with an intent to deliver it to others, that Singleton worked as a runner to deliver heroin for defendant, and that the firearm was readily accessible to Singleton. A jury could infer from the testimony the firearm was readily available and easily accessible to one or more of the accomplices to protect the drug delivery

operation. That is a sufficient connection. O'Neal, 159 Wn.2d at 506; State v. Gurske, 155 Wn.2d 134, 138–139, 118 P.3d 333 (2005). A rational trier of fact could find beyond a reasonable doubt, that defendant or an accomplice was armed with a firearm at the time of the crime.

B. THE JURY WAS CORRECTLY INSTRUCTED ON THE APPLICABLE LAW ALLOWING DEFENDANT TO ARGUE HIS THEORY OF THE CASE.

Defendant argues the trial court erred by not giving the special verdict instruction proposed by defendant. Brief of Appellant 9-16. Before addressing whether an instruction fairly allowed the parties to argue the case, the court must first determine whether the instructions accurately stated the law without misleading the jury. State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002).

1. The Instructions Correctly Stated The Applicable Law.

Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal. State v. Brown, 147 Wn.2d 330, 339,

58 P.3d 889 (2002). However, not every omission or misstatement in a jury instruction relieves the State of its burden. Id. A constitutional error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. Linehan, 147 Wn.2d at 643; State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). “A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” State v. Smith, 131 Wn.2d 258, 264, 930 P.2d 917 (1997) (citations omitted). Whether jury instructions as a whole correctly state the applicable law is a question of law reviewed de novo. Pirtle, 127 Wn.2d at 656.

Here, defendant was charged with possession of a controlled substance with intent to deliver while he or an accomplice was armed with a firearm. CP 121-122. The trial court correctly instructed the jury on the elements of that offense and the firearm allegation. CP 30 (Instruction 6, WPIC 50.14), 39 (Instruction 15, WPIC 2.07), 41 (Instruction 17, WPIC 10.51).

2. The Instructions Allowed The Parties To Argue The Case.

Jury instructions are appropriate if they allow the parties to argue their theories of the case, do not mislead the jury, and do not misstate the law. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). It is not error to refuse to give a specific instruction when a more general instruction adequately explains the law and allows each party to argue its theory of the case. State v. Schulze, 116 Wn.2d 154, 168, 804 P.2d 566 (1991). Refusal to give a proposed instruction is reviewed under an abuse of discretion standard. State v. Castle, 86 Wn. App. 48, 62, 935 P.2d 656 (1997).

Here, defendant proposed a modified special verdict instruction that included the following sentence: "Mere presence of a deadly weapon at the scene is insufficient to establish a nexus between the crime and the weapon." CP 64; RP 266, 272-274, 280-281. The special verdict instruction given by the court used "connection" rather than "nexus." CP 39. The lack of the word "nexus" does not render the generally used enhancement instructions per se inadequate. Eckenrode, 159 Wn.2d at 493-494; State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005).

Defendant's theory on the firearm allegation was threefold. First, defendant argued that he was not armed, his fingerprints were not on the firearm, and the bag with the firearm was all the way across the room. RP 309. Second, defendant argued that it did not matter if Singleton was armed because the State did not prove he was an accomplice. RP 310-312. Third, defendant argued that Singleton was not armed under the instruction's definition because: "There was no connection between the crime and the weapon and the person and the accomplice. And there really isn't. What we just had is it was there next to him and that's it." RP 312. Clearly, the court's instructions allowed defendant to argue that the mere presence of the firearm at the scene was insufficient. The record demonstrates that the instructions allowed defendant to argue his theory of the case, did not mislead the jury, and did not misstate the law.

IV. CONCLUSION

For the reasons stated above, defendant's conviction and the special verdict should be affirmed.

Respectfully submitted on November 18, 2014.

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