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68475-2

NO. 68475-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND MAK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Susan Cook, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred by failing to instruct the jury that it must be unanimous as to the alternative means of committing possession with intent.

2. The court erred by denying the defense objection to giving the jury instruction defining possession with intent to manufacture.

3. The jury erred by convicting Mak of maintaining a vehicle for drug trafficking without sufficient evidence to support the conviction.

4. The trial court erred by denying Mak's motion for a directed verdict finding him not guilty of maintaining a vehicle for drug trafficking.

Issues Pertaining to Assignments of Error

1. Whether Mak's constitutional right to a unanimous jury verdict was violated where jurors were not required to agree on whether their conviction for unlawful possession with intent was based on the alternative means of manufacturing or delivery and there was insufficient evidence of intent to manufacture.

2. Whether the jury erred by convicting Mak of maintaining a vehicle for drug trafficking where there was no

evidence that the car was ever used for illegal drug activity other than this one time.

B. STATEMENT OF THE CASE

In January of 2011, undercover border-control agent Seim DeLaCruz began posing as a high-level drug dealer in phone calls and meetings with Jeffrey Huynh. 1RP 61-62.[1] Huynh presented himself as a would-be "middle man," who was attempting to broker the sale of cocaine. 1RP 61.

Huynh and DeLaCruz talked for months by phone and had one face-to-face meeting without reaching an agreement because Huynh was unable to come up with the money. 1RP 63, 66-67, 69. In their first meeting in February of 2011, Agent DeLaCruz understood that Huynh was bringing the buyer with him. 1RP 67, 75. The man Huynh brought was not identified, but it was not Mak. 1RP 114. They looked at the cocaine DeLaCruz proposed to sell, but did not make the purchase. 1RP 77, 79.

Huynh continued to call DeLaCruz, discussing different buyers and different amounts for the deal ranging from one kilo to

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[1] For purposes of this brief, the report of proceedings will be cited as follows: the four volumes numbered sequentially will be referred to as 1RP, 2RP, etc; the remaining volumes will be cited by date, i.e., 2/10/12 RP.

five kilos. 1RP 114-15, 2RP 108, 152-53. Huynh never mentioned names and DeLaCruz only met two of the potential "buyers." 1RP 120, 3RP 14-15. He thought there were at least three different "buyers" Huynh talked with in attempting to put together a deal. 1RP 114-115.

The first time DeLaCruz met Raymond Mak or heard his name was on May 20, the second meeting Huynh had arranged. 1RP 83. Huynh called DeLaCruz and said they were "ready" and had $42,000 for two kilos of cocaine. 2RP 115. When DeLaCruz arrived at the meeting place, a local restaurant, Huynh was at a table with Mak and a man identified as Jiayin Lin. 2RP 126, 3RP 73.

Huynh asked to talk with DeLaCruz alone outside first. Huynh confirmed with DeLaCruz that he would get a broker's fee for the transaction of $4,000 and that he wanted to work with DeLaCruz on future deals. 2RP 126-27. Huynh said he had buyers who would buy three to five kilos every other week. 2RP 127.

When they returned to the table, DeLaCruz told the men he wanted to see the money. 2RP 130. He followed Huynh and Mak

The prosecutor then argued in closing argument that the jury could convict Mak of possession with intent to manufacture, or possession with intent to deliver. 4RP 81, 85-86.

Mak was convicted of possession with intent to manufacture or deliver a controlled substance, cocaine; conspiracy to possess with intent to manufacture or deliver a controlled substance; and maintaining a vehicle for drug trafficking. CP 53-55. The jury also returned special verdicts finding the "major drug violation" aggravator. CP 56-57.

Mak had no prior convictions. CP 61. His standard ranges were: for possession with intent and conspiracy, twelve to twenty months; for maintaining a vehicle for drug trafficking, zero to twelve months. CP 62-63. The court sentenced Mak to an exceptional sentence of 96 months on counts one and two, concurrent with a sentence of twenty months on count three. CP 63, 2/10/12 RP 37. This appeal timely follows. CP 89-90.

C. ARGUMENT

1. MAK'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED BECAUSE JURORS WERE NOT REQUIRED TO AGREE ON WHETHER THEIR CONVICTION FOR UNLAWFUL POSSESSION WITH INTENT WAS BASED ON THE ALTERNATIVE MEANS OF MANUFACTURING OR DELIVERY.

Criminal defendants in Washington have a right to unanimous jury verdicts. Wash. Const., art. I, § 21. This includes "the right to express jury unanimity on the means by which the defendant is found to have committed the crime." State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). A violation is harmless only if sufficient evidence exists to support each of the alternative means presented to the jury. Ortega-Martinez, 124 Wn.2d at 707-8.

"If the evidence is insufficient to support both means, either the prosecutor must elect the means supported by the evidence, or the court must instruct the jury to rely on that means during deliberations." State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046 (2006), citing State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). The Supreme Court has made it clear that "an instruction on jury unanimity as to the alternative method found is preferable because it eliminates potential problems which may

arise when one of the alternatives is not supported by substantial evidence." State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987); see also Ortega-Martinez, 124 Wn.2d at 717, n. 2. The failure to provide the required unanimity instruction in such circumstances requires reversal of the verdict. State v. Klimes, 117 Wn. App. 758, 770, 73 P.3d 416 (2003); Ortega-Martinez, 124 Wn.2d at 708.

Evidence is not sufficient to support a conviction unless, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

Mr. Mak was charged with violating RCW 69.50.401 by possession of a controlled substance with intent to manufacture *or* delivery of a controlled substance, cocaine. CP 10. Both alternative means were submitted to the jury in the "to convict" instruction, both delivery and manufacture were defined, and the State argued both alternative means to the jury in closing argument. CP 32, 33, 37, 38; 4RP 81, 85-86. However, the jury

was not instructed that it must unanimously agree on which alternative means to base a guilty verdict.[2]

Here, the State did not present sufficient evidence to establish one of the alternative means beyond a reasonable doubt: that Mr. Mak was guilty of possession with intent to manufacture cocaine. In closing argument, the State argued to the jury that it could find Mr. Mak guilty of possession with intent to manufacture because Agent DeLaCruz and Agent Belanger testified to "what you can do with two kilograms of cocaine," specifically that it is sometimes cut down to increase the profit. 4RP 85.

Agent DeLaCruz testified that he was representing the two kilos of cocaine he was offering to sell as cocaine that had been "stepped on," or diluted. 1RP 80. He suggested that cocaine can be diluted by mixing it with various other additives such as baby

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[2] Mr. Mak's trial counsel did not specifically request a unanimity instruction below. However, she did object to the instructions including manufacture as an alternative means, arguing that there was insufficient evidence to support giving these instructions to the jury. 4RP 62-63. The court overruled the objection and gave the instructions proposed by the State, including both alternative means. 4RP 63. Consequently, the trial court was alerted to the problem even though the defense did not request a unanimity instruction. Nevertheless, a unanimous jury is a constitutional right. It is a manifest constitutional error and the record is sufficient for review. Therefore, this issue can be raised for the first time on appeal. RAP 2.5.

powder and vitamin powder. 1RP 80. Both Agent DeLaCruz and Agent Belanger also testified that it was "common" for cocaine to be "stepped on" as it works its way down to the street. 1RP 82; 2RP 18-19. The purpose of this is to increase profit. 2RP 19. Agent Belanger testified that this is done by mixing a cutting agent with the cocaine in mixing bowls with acetone. 2RP 19-20.

However, while both agents testified that cocaine *could be* "stepped on," there is no evidence whatsoever that there was a plan to do that in this case. Neither Mak nor Huynh ever said anything about "stepping on" the cocaine. No acetone or mixing bowls were found. Merely having the police speculate about manufacturing in the drug industry does not provide any evidence that Mak or Huynh formed the intent to manufacture in this case. There was insufficient evidence to prove beyond a reasonable doubt that the cocaine was possessed with intent to manufacture.

Because there was insufficient evidence of one of the alternative means of committing possession with intent, and the jury was not instructed that it must be unanimous, Mr. Mak's constitutional right to a unanimous jury was violated and his conviction for possession with intent to manufacture or deliver must be reversed. See Ortega-Martinez, 124 Wn.2d at 708.

2. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR MAINTAINING A VEHICLE FOR DRUG TRAFFICKING.

Under the state and federal constitutions, a criminal conviction requires proof beyond a reasonable doubt. Jackson v. Virgina, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). As stated above, evidence is not sufficient to support a conviction unless, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). The court must consider "'whether the totality of the evidence is sufficient to prove all the required elements.'" State v. Marin, 150 Wn. App. 434, 438, 208 P.3d 1184 (2009), quoting State v. Ceglowski, 103 Wn. App. 346, 349-50, 12 P.3d 160 (2000).

Mr. Mak was charged with maintaining a vehicle for drug trafficking under RCW 69.50.402(1)(f). CP 10-12. Mr. Mak moved for a directed verdict on this count at the close of evidence, arguing that there was no evidence that this vehicle was maintained for

drug trafficking. 4RP 48-49. The court denied the motion. 4RP 49. The jury subsequently convicted. CP 55.

RCW 69.50.402(1)(f) provides in relevant part that it is unlawful for a person:

> [k]nowingly to keep or maintain any . . . dwelling, . . . vehicle . . . or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

This statute is sometimes referred to as the "drug house statute." See State v. Ceglowski, 103 Wn. App. 346, 349, 12 P.3d 160 (2000). Washington caselaw holds that for a conviction under this statute, the State must provide "some evidence that the drug activity was continuing and recurring in nature and that a substantial purpose in the maintenance of the vehicle was to conduct illegal drug activities." Marin, 150 Wn. App. at 438-39, citing Ceglowski, 103 Wn. App. at 349-50. The Ceglowski court reasoned, although the statute does not expressly state whether a single instance of sale or possession is enough for a conviction:

The requirement that the defendant "maintain" the premises, however, necessarily connotes a course of continuing conduct. Although "maintain" is not specifically defined under the drug house

statute, "'[i]n the absence of a statutory definition of a word, we employ the plain and ordinary meaning of the word as found in a dictionary.' " State v. Batten, 95 Wash.App 127, 129, 974, P.2d 879 (1999), aff'd, 140 Wash.2d 362, 997 P.2d 350 (2000) (citation omitted). Black's Law Dictionary defines "maintain" as "hold or preserve in any particular state or condition;" and "sustain" or "uphold." BLACK'S LAW DICTIONARY 953 (7th ed.1999). And the ordinary meaning of "maintain" encompasses this concept of continuing conduct: "to keep or keep up; continue in or with; carry on." WEBSTER'S NEW WORLD DICTIONARY, 854 (2d College Ed.1976).

Ceglowski, 103 Wn. App. at 350-51.

There was no evidence in this case that the vehicle had been used for drug transactions on any occasion other than this one, where Mak placed the cocaine in the trunk of the car. Thus, there was no evidence beyond this "single isolated incident," which is not enough to show that Mr. Mak "maintains" the vehicle for keeping or selling a controlled substance. See State v. Ceglowski, 103 Wn. App. at 350.

In Ceglowski, the court held that evidence that a single drug sale occurred at the business, along with handwritten "pay and

owe" sheets that may or may not have been drug records, was insufficient to show that other sales took place on the premises or that a substantial purpose for maintaining the business was drug activity. 103 Wn. App. at 353-54. The court reversed Ceglowski's conviction under RCW 69.50.402(1)(f).

The holding in Ceglowski applies with equal force to cases involving maintaining a vehicle for drug trafficking purposes. State v. Marin, 150 Wn. App. 434, 438-39, 208 P.3d 1184 (2009). In Marin, the evidence showed that: the defendant had possessed the vehicle for several days; a scale and drugs packaged for street resale were found inside; and, a hidden compartment had recently been constructed inside, which the narcotics dog alerted on. 150 Wn. App. at 439. In addition, a police expert testified that based on the above, it was his belief that the vehicle was being used for drug trafficking. Marin, at 439. The court held that this was sufficient to support Marin's conviction for maintaining a vehicle for drug trafficking. Id., at 439-440.

In this case, there was nothing found in the vehicle to indicate it had been used before or would be used in the future for illegal drug activity. No drugs were found in the car other than the two kilos purchased here. No money was found. No scales or

packaging was found. The car had not been altered in any way to make hiding places for drugs. Like Ceglowski, the evidence presented here of only one isolated use of the vehicle for the transport of drugs is insufficient to prove the vehicle was "maintained" for the purpose of illegal drug activity. Mr. Mak's conviction for maintaining a vehicle for drug trafficking must be reversed.

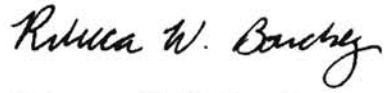
D. CONCLUSION

Mak's conviction for unlawful possession must be reversed because the court's failure to instruct the jury that it must be unanimous as to the alternative means violated his constitutional right to a unanimous jury verdict. In addition, Mak's conviction for maintaining a vehicle for drug trafficking must be reversed because there is insufficient evidence to support the conviction.

DATED: August 31, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68475-2-I
	)	
RAYOMD MAK,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF AUGUST 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RAYOMD MAK
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MONORE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2012.

x Patrick Mayovsky

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DIVISION ONE

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