

NO. 34953-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY MICHAEL FOSTER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming

No. 04-1-04724-4

BRIEF OF RESPONDENT

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DIVISION II
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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Was there sufficient evidence to convict defendant of two counts of unlawful delivery of a controlled substance where an eye witness saw defendant deliver the controlled substances on two occasions? 1

 2. Was there sufficient evidence to find defendant guilty of one count of bail jumping where defendant signed a scheduling order on which the hearing was listed? 1

B. STATEMENT OF THE CASE. 1

 1. Procedure 1

 2. Facts 2

C. ARGUMENT. 5

 1. THE JURY HAD SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF TWO COUNTS OF UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE 5

 2. THE JURY HAD SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF BAIL JUMPING 11

D. CONCLUSION. 14

Table of Authorities

State Cases

<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	5
<u>State v. Ball</u> , 97 Wn. App. 534, 536-37, 987 P.2d 632 (1999).....	11, 12, 13
<u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <u>review denied</u> , 111 Wn.2d 1033 (1988)	6, 10
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	6
<u>State v. Carver</u> , 122 Wn. App. 300, 306, 93 P.3d 947 (2004).....	11
<u>State v. Casbeer</u> , 48 Wn. App. 539, 542, 740 P.2d 335, <u>review denied</u> , 109 Wn.2d 1008 (1987).....	6
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	7
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)	6
<u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965)	6
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	6, 10
<u>State v. Mabry</u> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	6
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)	5
<u>State v. Roberts</u> , 25 Wn. App. 830, 834, 611 P.2d 1297 (1980)	9, 10
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	6
<u>State v. Turner</u> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	6

Statutes

RCW 69.50.101(f)7
RCW 69.50.401(1)7
RCW 69.50.401(2)(b).....7
RCW 9A.76.170(1).....11

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence to convict defendant of two counts of unlawful delivery of a controlled substance where an eye witness saw defendant deliver the controlled substances on two occasions?
2. Was there sufficient evidence to find defendant guilty of one count of bail jumping where defendant signed a scheduling order on which the hearing was listed?

B. STATEMENT OF THE CASE.

1. Procedure

On October 8, 2004, the Pierce County Prosecutor's office charged JEFFREY MICHAEL FOSTER, hereinafter "defendant," with two counts of unlawful delivery of a controlled substance. CP 1-4.

Defendant was scheduled to appear at an omnibus hearing on October 26, 2004. CP 8. Defendant did not appear for this hearing. RP(2) 128-29, 176-177.¹ The court also ordered defendant to appear at

¹ The transcripts from the trial proceedings are divided into three groups that are not all paginated consecutively. Citations to the proceedings of January 20, 2005, will be preceded by "RP(1)" (e.g. "RP(1) 1"). Citations to the proceedings that occurred from September 22, 2005, to June 2, 2006, will be preceded by RP(2) (e.g. "RP(2) 1"). Citations to the proceedings of May 10, 2006, will be preceded by "RP(3)" (e.g. "RP(3) 1").

two hearings on January 5, 2004: one at 8:30 a.m., and one at 1:30 p.m. CP 16. Defendant did not appear at the 8:30 a.m. hearing, but did attend the 1:30 p.m. hearing. RP(1) 4; RP(2) 180, 188; CP 16 (attached hereto as Appendix "A"). The State then amended its information to include two charges of bail jumping. CP 21-24.

This case proceeded to a jury trial on September 26, 2005. RP(2) 19. On September 27, 2005, the jury found defendant guilty of two counts of unlawful delivery of a controlled substance and one count of bail jumping for his failure to attend the January 1, 2005, hearing. RP(2) 212-215; CP 52-55, 68-80. Defendant was sentenced to a total of 84 months for these crimes with credit for 36 days served in custody. CP 68-80. He was also ordered to pay monetary penalties. CP 68-80. From this judgment and sentence, defendant has filed a timely notice of appeal. CP 81-84.

2. Facts

On September 15, 2004, Detective Donald Gill was working undercover when he drove a man named Louie Wilson to 817 7th Ave NW in Puyallup, Washington, to purchase drugs. RP(2) 57, 58. Officer Michael Clark drove confidential informant Michael Turner to the same house a short time later. RP(2) 36, 89, 94, 95. Officer Clark searched Mr. Turner to make sure he did not have any controlled substances, weapons, or money. RP(2) 35-36. Officer Clark then gave Mr. Turner \$40 with which he could buy controlled substances at the Puyallup residence.

RP(2) 35-36, 62. Mr. Turner went into the house and soon came out with Mr. Wilson. RP(2) 36-37, 60, 95. The two men walked to the nearby Cavalier Apartments and went inside to Apartment 31, which was rented by a man named Michael Smith. RP(2) 37-38, 62, 95, 159. Mr. Turner was in the living room of Apartment 21 when defendant arrived and went into a bedroom with Mr. Smith. RP(2) 95. A moment later, defendant called Mr. Turner into the bedroom. RP(2) 96. When Mr. Turner entered the bedroom, defendant poured what looked like drugs onto a small digital scale. RP(2) 96. Defendant then placed the drugs in a small plastic bag and gave the bag to Mr. Smith. RP(2) 96. Mr. Turner then gave Mr. Smith some money, and Mr. Smith gave Mr. Turner the plastic bag. RP(2) 96.

Mr. Turner left the apartment and took the bag to Officer Clark's car. RP(2) 96. Officer Clark and Detective Gill recognized the drugs as methamphetamine. RP(2) 38, 39, 62, 63. Lab testing confirmed that the plastic bag contained .6 grams of methamphetamine. RP(2) 62. Mr. Turner was searched to make sure he did not have any more controlled substances or money. RP(2) 96. The police officers took him to the police station to write out a statement of the evening's events. RP(2) 96.

Detective Gill was again working undercover on September 29, 2004. RP(2) 64, 66. That day, he searched Mr. Turner to make sure Mr. Turner did not have any controlled substances, weapons, or money. RP(2) 66. Then Detective Gill gave Mr. Turner \$40 with which to buy drugs.

RP(2) 66. He drove Mr. Turner to a trailer court at 7910 River Road in Puyallup, Washington, and parked in front of Space No. 16, which is where defendant lived at the time. RP(2) 64, 66.

Mr. Turner got out of the vehicle and went to the trailer on Space No. 23, which belonged to Auddie Murphy. RP(2) 72, 97-99. Mr. Murphy was standing outside the trailer. RP(2) 99. Mr. Turner told Mr. Murphy that he needed some "crank," and Mr. Murphy told Mr. Turner to go inside the trailer. RP(2) 99. Defendant was waiting inside the trailer, and he sent a woman named Crystal to get some drugs out of a blue car. RP(2) 99. When Crystal returned, defendant sold the drugs to Mr. Turner. RP(2) 99.

While Mr. Turner was inside the trailer, a resident of the trailer park began asking Detective Gill questions. RP(2) 70, 72. To protect his cover, Detective Gill left the trailer park and went to a local strip mall to wait for Mr. Turner. RP(2) 70, 72. Mr. Turner met Detective Gill at the strip mall and gave him the drugs he purchased from defendant. RP(2) 73, 99. The drugs field tested positive for methamphetamine. RP(2) 73-74. Laboratory testing confirmed that the drugs were methamphetamine. RP(2) 73, 74, 76, 77.

Defendant testified at trial, claiming that he did not know Michael Smith, and that he had never been to Mr. Smith's apartment at the Cavalier Apartments. RP(2) 172-173. He admitted to living in trailer No. 16 in the trailer park, and he admitted that he knew Louie Wilson. RP(2)

167, 172. Defendant claimed that he never met Mr. Turner before being arrested in this case. RP(2) 174-75.

Defendant also claimed that he did not appear at the October 26, 2004, omnibus hearing because he was in the hospital at the time with an infection on his arm. RP(2) 176-77. He admitted that he had read the scheduling order and that he could read the order setting the January 1, 2005, hearings. RP(2) 179; CP 16. He admitted that he failed to appear at the 8:30 a.m. hearing on January 5, 2005, but he did attend the 1:30 p.m. hearing that day. RP(2) 180, 188. Defendant claimed that he would have appeared at the 8:30 a.m. hearing, but he misread the scheduling order and did not realize he had two hearings in one day. RP(2) 180-181.

The jury found defendant guilty as charged of two counts of unlawful delivery of a controlled substance. RP(2) 212; CP 52-55, 68-80.

C. ARGUMENT.

1. THE JURY HAD SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF TWO COUNTS OF UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is 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. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Salinas, 119 Wn.2d 192; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations

should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A person is guilty of unlawful delivery of a controlled substance if that person delivers a controlled substance to another. RCW 69.50.401(1). “Deliver” means “actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.” RCW 69.50.101(f). Methamphetamine is a controlled substance. RCW 69.50.401(2)(b). Thus, the State proved that defendant unlawfully delivered a controlled substance if it proved that defendant transferred methamphetamine to another person.

- a. The jury had sufficient evidence to find that defendant unlawfully delivered methamphetamine on September 15, 2004.

There is ample evidence that defendant sold methamphetamine to Mr. Turner on September 15, 2004. That day, Mr. Turner went to Apartment 31 of the Cavalier Apartments. RP(2) 37, 62, 95. While he

was in the living room of the apartment, defendant and Mr. Smith came into the apartment and went into the bedroom. RP(2) 95. Defendant then called Mr. Turner into the bedroom. RP(2) 96. Defendant poured methamphetamine onto a digital scale. RP(2) 96. Defendant then bagged the methamphetamine and gave it to Mr. Smith. RP(2) 96. Mr. Turner then paid Mr. Smith, and Mr. Smith gave defendant the methamphetamine. RP(2) 96. Mr. Turner then returned to Officer Clark's car and gave him a .6 gram bag of methamphetamine. RP(2) 38, 39, 62, 63, 96.

Laboratory testing determined that the substance that defendant delivered to Mr. Turner was methamphetamine. RP(2) 62.

The State thus proved that defendant unlawfully delivered a controlled substance on September 15, 2004, because there was evidence that defendant transferred methamphetamine from his control to Mr. Turner's control that day.

- b. The jury had sufficient evidence to find that defendant unlawfully delivered methamphetamine on September 29, 2004.

There is ample evidence that defendant sold methamphetamine to Mr. Turner on September 29, 2004. Detective Gill drove defendant to the trailer park at 7910 River Road that day. RP(2) 64, 98. Detective Gill parked outside of defendant's trailer and Mr. Turner got out of Detective

Gill's vehicle. RP(2) 66, 68, 99. Mr. Turner then went to Mr. Murphy's trailer and told him he wanted some "crank." RP(2) 99. Mr. Murphy sent Mr. Turner into the trailer, where defendant was waiting. RP(2) 99. Defendant asked someone to retrieve methamphetamine from a blue car; she complied. RP(2) 73-74, 76-77, 99. Defendant then gave Mr. Turner the methamphetamine, and Mr. Turner paid him for them. RP(2) 99.

Laboratory testing confirmed that the substance defendant gave to Mr. Turner was methamphetamine. RP (2) 73, 74, 76, 77.

The State thus proved that defendant unlawfully delivered a controlled substance on September 29, 2004, because there was evidence that defendant transferred methamphetamine from his control to Mr. Turner's control that day.

- c. State v. Roberts does not change the standard of review for sufficiency of the evidence claims.

Defendant cannot challenge Mr. Turner's credibility on appeal. Defendant relies on State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980), to argue that an appellate court can review credibility determinations by the trial court. Br. of Appellant at 7-8. It is established law in Washington, however, that credibility determinations are for the trier of fact alone, and that all reasonable inferences must be drawn in a light most favorable to the State when defendant challenges the

sufficiency of the evidence. See State v. Joy, 121 Wn.2d 333; see also State v. Barrington, 52 Wn. App. 478. Moreover, by challenging the sufficiency of the State's evidence, defendant admits that the evidence the State offered at trial is true. See Barrington, 52 Wn. App. 478.

State v. Roberts did not change the established Washington practice of allowing the trial court to make credibility determinations. Roberts addressed whether Roberts had been denied the "right to effective cross-examination" of a witness against him. Roberts, 25 Wn. App. at 836. The Roberts court found that, when a case stands or falls based on the jury's belief of a single witness, that witness must be subjected to the "close scrutiny" of cross examination. Id. at 834. Roberts did not hold, however, that a different standard of review applies when the State's case uses a single witness. Defendant makes no claim that he was ever denied the right to cross examine any witnesses against him, so State v. Roberts has no bearing on this case.

Mr. Turner's credibility cannot be revisited on appeal. By challenging the sufficiency of the State's evidence, defendant admitted that the jury could rely on Mr. Turner's testimony, and that Mr. Turner's testimony is true. The evidence Mr. Turner provided is sufficient to uphold defendant's convictions for unlawful delivery of a controlled substance.

2. THE JURY HAD SUFFICIENT EVIDENCE TO FIND
DEFENDANT GUILTY OF BAIL JUMPING.

A person is guilty of bail jumping if the person has “been released by court order ... with knowledge of the requirement of a subsequent personal appearance before any court of this state... and [the person] fails to appear.” RCW 9A.76.170(1). To prove the knowledge element, “the State must prove only that [a defendant] was given notice of his court date--not that he had knowledge of this date every day thereafter.” State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). The fact that a defendant forgot about a scheduled appearance is not a defense to the crime of bail jumping. Id. The State does not have to prove that, on the precise day of the hearing, a defendant had knowledge that he was supposed to appear. State v. Ball, 97 Wn. App. 534, 536-37, 987 P.2d 632 (1999).

Defendant was released by court order, scheduled to appear at 8:30 a.m. on January 1, 2005, and failed to appear. RP(1) 4; RP(2) 180, 188; CP 16; Br. of Appellant at 10. Thus, the only factual issue in this case is whether defendant knew that he had to appear at 8:30 a.m. on January 1, 2005.

Defendant knew that he was supposed to appear at 8:30 a.m. on January 1, 2005. Defendant received and signed the scheduling order that instructed him to appear on January 1. RP(2) 142-144; CP 16; see Appendix A. The first paragraph of the order has a table listing the

hearings for which defendant is scheduled to appear. CP 16. There are two “x” marks next to the two types of hearings that defendant was scheduled to attend on January 1, 2005. CP 16. The date of the hearings (“1/5”) is listed twice – once next to each hearing. CP 16. The hearing times appear in a separate column next to those hearings. CP 16. The second paragraph of the order says “defendant shall be present at these hearings.” CP 16. The second paragraph also contains a centered, double spaced, bolded warning written in capital letters that reads: “**FAILURE TO APPEAR WILL RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST.**” CP 16.

Defendant was represented by Holly Stanton when he signed the scheduling order. RP(2) 142. Ms. Stanton said that she generally reviews a scheduling order with a client before the client signs the order. RP(2) 143. This review typically includes a discussion about when the next hearing is scheduled. RP(2) 143.

Defendant read the scheduling order and remembered seeing it when it was shown to him at trial. RP(2) 179. He demonstrated that he could read and understand this order when he appeared for the afternoon hearing that was scheduled on the order. RP(1) 3-4; CP 16.

This case is similar to other cases in which the State proved the knowledge element of bail jumping by showing that the defendant was aware of his obligation to appear at a scheduled hearing. In State v. Ball, 97 Wn. App. 534, the State satisfied the knowledge element by simply

introducing documentation signed by Ball that (1) listed the date of Ball's next appearance, (2) informed Ball he had a duty to appear, and (3) warned Ball that if he did not appear, a bench warrant would be issued and he would be arrested. Id. at 536.

In this case, the State introduced documentation signed by defendant that (1) listed the January 1, 2005, hearing at 8:30 a.m., (2) ordered defendant that he "shall be present at these hearings and report to the courtroom indicated," and (3) warned defendant, "failure to appear will result in a warrant being issued for your arrest." CP 16. These cases are identical. Just as the State proved that Ball had knowledge that he was required to appear, the State in this case proved that defendant had knowledge that he was required to appear.

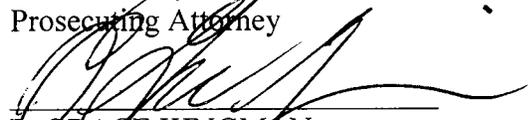
The State provided the jury with overwhelming evidence of the knowledge element of bail jumping because there was evidence that defendant was aware of his duty to appear at 8:30 a.m. on January 1, 2005.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentence.

DATED: January 10, 2007.

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Pierce County
Prosecuting Attorney



P. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

John M. Cummings
Legal Intern

Certificate of Service:

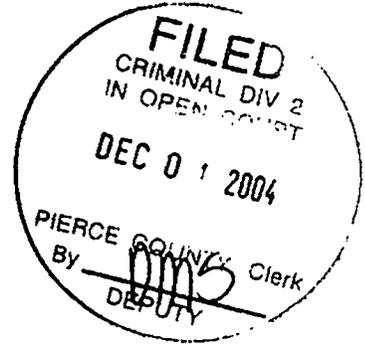
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-10-07 [Signature]
Date Signature

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APPENDIX "A"

Scheduling Order



IN THE SUPERIOR COURT FOR PIERCE COUNTY WASHINGTON

State of Washington,
 Plaintiff
 vs.
Jeffrey Foster
 Defendant

NO. 04-1-04724-4

SCHEDULING ORDER

IT IS HEREBY ORDERED that:

1. The following court dates are set for the defendant:

Approval No	Hearing Type	Date	Time	Courtroom
	<input type="checkbox"/> Pretrial Conference	,20	AM/PM	
1301784	<input checked="" type="checkbox"/> Omnibus Hearing	1/5, 2005	8:30 AM	CD2
	<input type="checkbox"/> Status Conference	,20	8:30 AM	CDPJ
1301785	<input checked="" type="checkbox"/> Motion: Cond.	1/5, 2005	1:30 PM	CDPJ
	<input type="checkbox"/> Pros. agrees 3.6 hrg. necessary			
	<input type="checkbox"/> TRIAL	,20	8:30 AM	CDPJ
	<input checked="" type="checkbox"/>	,20	AM/PM	
	<input type="checkbox"/>	,20	AM/PM	

2. The defendant shall be present at these hearings and report to the courtroom indicated at 930 Tacoma Avenue South, County-City Building, Tacoma, Washington, 98402

FAILURE TO APPEAR WILL RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST.

3. DAC; Defendant will be represented by Department of Assigned Counsel.
 Retained Attorney; Defendant will hire their own attorney or, if indigent, be Screened (interviewed) for Department of Assigned Counsel Appointment.

Dated 12/1, 2004.

Copy Received:
Jeffrey M. Foster
 Defendant
[Signature]
 Attorney for Defendant/Bar # 26353

[Signature]
 JUDGE
Frank Loomis
 Prosecuting Attorney/Bar # 3399