

NO. 36036-5

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

STATE OF WASHINGTON, RESPONDENT

v.

CHANCE MANWELL LAKEY RIVERS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable K.A. van Doorninck, Judge

No. 06-1-04001-7

BRIEF OF RESPONDENT

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

1. When viewed in the light most favorable to the State, was there sufficient evidence presented that the defendant committed unlawful delivery of a controlled substance, cocaine, and possession of a controlled substance, cocaine, with the intent to deliver when (1) an informant was searched before the buy, (2) the informant arranged to meet the defendant by calling a telephone number of a piece of paper with a "C" on it, (3) the informant was the only person in the vehicle with the defendant, (4) when the informant returned to the officers she had crack cocaine, (5) the defendant had the pre-recorded buy money given to the informant in his possession when stopped, (6) officers located additional pieces of paper with a telephone number and the letter "C" on them in the defendant's vehicle, (7) cocaine was located in the vehicle, (8) a digital scale was located in the vehicle, (9) cocaine fell out of the defendant's pants, and (10) more cocaine was found in the patrol car after the defendant was seen moving around?
2. Was the defendant "armed" with a firearm that was easily accessible and readily available for use during the commission of the underlying crimes when the operable, loaded, firearm was located at the feet of the defendant when he was stopped and the defendant admitted to the police that the firearm was there?

B. STATEMENT OF THE CASE.

1. Procedure

On February 7, 2007, Chance Manwell Lakey Rivers, hereinafter "defendant," was charged by amended information with unlawful delivery of a controlled substance, cocaine, unlawful possession of a controlled substance, cocaine, with the intent to deliver, and unlawful possession of a

firearm in the second degree. CP 7-8. On February 7, 2007, both parties appeared for trial. (2/7/07¹) RP 1. On February 13, 2007, the defendant was convicted of unlawful delivery of a controlled substance, unlawful possession of a controlled substance with the intent to deliver, and unlawful possession of a firearm in the second degree. CP 47-50. The defendant was also found to have been in possession of a firearm during the unlawful delivery of a controlled substance and the unlawful possession of a controlled substance with the intent to deliver charges. CP 51-52.

The defendant was sentenced to 120 months in custody. CP 60-72. On March 2, 2007, the defendant filed a timely notice of appeal.

2. Facts

On August 25, 2006, Officer Ryan Hamilton picked up an informant who had been arrested for prostitution and who was willing to purchase crack cocaine from her supplier in order to avoid prosecution. (2/8/07) RP 11, 13. The informant's drug supplier was someone known to Officer Hamilton as "Chance." (2/8/07) RP 13. The informant pulled out a piece of paper that had the letter "C" and a telephone number on it. (2/8/07) RP 13. The informant called the number and Officer Hamilton was able to hear that a male answered the telephone. (2/8/07) RP 13.

¹ There are six volumes of verbatim reports of proceedings, each of which are individually numbered. For convenience of reference, the respondent will refer to each volume by date.

After the telephone conversation, the informant told Officer Hamilton where the deal had been set up. (2/8/07) RP 14. The location where the transaction occurred was at the intersection of Bridgeport and Pacific Highway, in Pierce County, Washington. (2/8/07) 14-15. At that point, the informant had already been stripped searched by Officer Olsen. (2/8/07) RP 10, 14. After the strip search, the informant was kept under constant surveillance by Officer Hamilton. (2/8/07) RP 14.

The informant and Officer Hamilton proceeded to the designated location and Officer Hamilton observed a silver PT Cruiser pull into the lot. (2/8/07) RP 15. The informant approached the PT Cruiser and got inside. (2/8/07) RP 15. The only two people in the vehicle were the informant and the defendant. (2/8/07) RP 15-16. The informant and the defendant remained in the vehicle for a few minutes and then the informant exited the vehicle and returned to Officer Hamilton. (2/8/07) RP 16. The informant then handed Officer Hamilton crack cocaine. (2/8/07) RP 16. The substance handed to Officer Hamilton was tested and found to contain cocaine. (2/8/07) RP 18, 96. The informant was again strip searched and found to be free of narcotics and money. (2/8/07) RP 19.

Before the informant met with the defendant, Officer Hamilton provided her with prerecorded money. (2/8/07) RP 18. When the defendant was later contacted, the defendant was in possession of the prerecorded buy money. (2/8/07) RP 60.

On August 25, 2006, Officer Sean Conlon was working in an under cover capacity. (2/8/07) RP 42-43. He testified that he conducted a narcotics operation with the assistance of an informant who agreed to call somebody she knew and had that person deliver crack cocaine. (2/8/07) RP 43. Officer Conlon's involvement in the operation was as part of the surveillance and arrest teams. Id. Once the deal was completed, he followed the PT Cruiser away. Id. The PT Cruiser was later stopped by marked patrol units. Id.

The individual who was driving the PT Cruiser was the defendant. (2/8/07) RP 43-44. Officer Conlon observed a firearm lying on the floor of the driver's side of the PT Cruiser, halfway between the pedals and the seat. (2/8/07) RP 44. The firearm was plainly visible from the outside of the vehicle. Id. The firearm was loaded when it was recovered. (2/8/07) RP 45. From the driver's seat, an individual could reach down and grab the gun off of the floor. (2/8/07) RP 59.

Under the driver's seat of the PT Cruiser was a Crown Royal bag that contained crack cocaine. (2/8/07) RP 47. The substance in the bag was later verified to contain cocaine. (2/8/07) RP 47, 100. In the glovebox of the vehicle some bullets were recovered, including one spent shell casing. (2/8/07) RP 69. In the rear of the vehicle, a digital scale was recovered. Id. In the lunge area where the defendant was sitting, Officer Ceron located a couple pieces of paper that had the letter "C" and a

telephone number written on them. (2/8/07) RP 77. The pieces of paper matched what the informant had in her possession. (2/8/07) RP 77-78.

When the defendant was searched by Officer Conlon, a bag of crack cocaine fell out of the defendant's pants. (2/8/07) RP 48. The suspected crack cocaine was later tested and found to contain cocaine. (2/8/07) RP 48, 98.

When questioned about the firearm, the defendant stated that he knew Officer Conlon would find it and that he was not going to try to hide it. (2/8/07) RP 49. The defendant also stated that some of the live rounds had fallen out of the gun. Id. The firearm was later determined to be operable. (2/8/07) RP 107.

Officer Jordan observed the defendant moving around inside the patrol car. (2/8/07) RP 36. Officer Jordan believed that the defendant was trying to discard or hide something as he was squirming in the seat of the car. (2/8/07) RP 37. When the defendant was removed from the patrol car Officer Jordan observed crack cocaine in the floorboard of the car. (2/8/07) RP 36. The substance was later tested and found to contain cocaine. (2/8/07) RP 37, 101. There was no one else in the back of the patrol car at the time. (2/8/07) RP 37.

The defendant called three witnesses. The first was Reginald Jenkins, who testified that he had left his firearm in the defendant's vehicle. (2/8/07) RP 117. He stated that he left it in the center console. Id. The second witness was Tyrone Richardson, who testified that he was

in the vehicle with the defendant on the night of the incident and that he never saw the defendant in possession of drugs or a firearm. (2/12/07 A.M.²) RP 6, 10. The defendant testified on his own behalf. (2/12/07 A.M.) RP 13. He stated that on the night of the incident when he was stopped he put the cocaine in his pants. (2/12/07 A.M.) RP 16. The defendant denied selling a woman drugs. (2/12/07 A.M.) RP 17-18. The defendant denied that there was a gun on the driver's floorboard. (2/12/07 A.M.) RP 18. The defendant stated that the cocaine in his possession was for personal use and had no knowledge about any pieces of paper with the letter "C" on them. (2/12/07 A.M.) RP 19, 22.

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVOABLE TO THE STATE, SUFFICIENT EVIDENCE WAS PRESENTED BELOW THAT THE DEFENDANT COMMITTED UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE AND POSSESSION OF A CONTORLLED SUBSTANCE WITH THE INTENT TO DELIVER.

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 rea-

² There are two volumes of verbatim reports of proceedings for February 12, 2007. They are separated into the morning and afternoon sessions. The respondent will refer to these volumes by the date on which they occurred, followed by an "A.M." designation for the morning session, and "P.M." for the afternoon session.

sonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). Also, a challenge to 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), rev. 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 defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. 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, rev. 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. The differences in the testimony of witnesses create the need for such credibility determinations;

these 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:

Great deference . . . is to be given to the trial court's factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witnesses' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). 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. When taken in the light most favorable to the State, there was sufficient evidence that the defendant unlawfully delivered cocaine when the informant was searched before the buy, she arranged to meet the defendant, when the informant did meet with the defendant, only the two of them were in the vehicle, when the informant returned she produced crack cocaine, and the defendant was in possession of the prerecorded buy money.

In order to convict the defendant of unlawful delivery of a controlled substance, the State must establish (1) that on or about August 25, 2006, the defendant delivered cocaine, that he knew the substance delivered was a controlled substance, and that the acts occurred in the State of Washington. CP 16-46 (Instruction #11). In the light most

favorable to the State, there was sufficient evidence for a rational trier of fact to find that the defendant committed unlawful delivery of a controlled substance.

In the present case, the informant was strip searched by a female officer and then kept under constant surveillance by Officer Hamilton.

(2/8/07) RP 10. Officer Hamilton stated that the informants are strip searched to ensure that they have no money or narcotics, which is what occurred in the present case. (2/8/07) RP 9. Officer Hamilton stated:

Usually, what we'll do for confidential informant, we'll do what are called "reliability buys." They prove to us they can go through the process of a controlled buys and purchase dope and bring it back to us. What that entails is the informant is strip searched at the beginning, making sure they have no narcotics on them at all, no money at all. The only money they have going into the buy is the money we give them, which is prerecorded. We photocopy it and have it for our file. After that, they go in and do the buy. During the time, the time they've searched until the end of the thing, they're kept in constant observation, until then. They go to the person who's supplying the narcotics, and they come back to us, they no longer have the money we gave them, and they have narcotics. We strip search them again to make sure they don't have any more money or narcotics on them. That's the way we do.

Prosecutor: Do you follow that protocol every time you utilize a CI?

Hamilton: Yes

Prosecutor: Now, in this case there was a confidential informant used. Is that right?

Hamilton: Yes. I believe I listed it as a testimonial informant.

Prosecutor: Is that kind of synonymous?

Hamilton: It's similar. When we called it testimonial informant, they haven't done the reliability buys. They've gone through the same thing. They're strip searched. They have no narcotics at all. We give them prerecorded money, and they go to the subject, and now they no longer have the money, and they have narcotics.

Prosecutor: Was that the process that was followed in this case?

Hamilton: It was just that, what I said. A female officer strip searched the informant. From that, I kept—after the search was done, I kept the CI under or the informant under constant surveillance. We went to the location where the buy happened. The CI—do you want to go through the whole buy?

(2/8/07) RP 9-10.

It is clear from the testimony of Officer Hamilton that the informant did not have any drugs or money in her possession at the time that she contacted the defendant. It was only after the informant called a phone number from a piece of paper with a "C" on it, and met the defendant in his vehicle, did the informant produce crack cocaine. From the time the informant was searched until the time she returned to Officer Hamilton after her meeting with the defendant, the informant was under constant surveillance by Officer Hamilton.

Drawing all reasonable inferences in favor of the State, a rational trier of fact could conclude that the informant, after not having any narcotics when she left to meet the defendant, and had narcotics when she returned, to conclude that the informant obtained the drugs from the

defendant. Moreover, the informant was provided prerecorded buy money, which was later recovered from the defendant's shirt pocket. (2/8/07) RP 18, 60. Again, reasonable inferences in favor of the State would lead to the conclusion that the defendant was given the prerecorded buy money in exchange for the cocaine. Finally, there was testimony that the transaction occurred in the State of Washington. (2/8/07) RP 14-15. There was sufficient evidence for a rational trier of fact to find that the defendant unlawfully delivered cocaine to the informant.

- b. When taken in the light most favorable to the State, there was sufficient evidence that the defendant committed unlawful possession of a controlled substance with the intent to deliver when the informant contacted him by calling a telephone number that was written on a piece of paper that had a "C" on it, the defendant had pieces of paper with the letter "C" and a telephone number on them, the defendant had crack cocaine in his vehicle, crack cocaine fell out of his pants, crack cocaine was found in the patrol car after the defendant was seen moving around, there was a digital scale in his vehicle, and there was evidence that the defendant had sold the informant cocaine moments earlier.

Where possession with intent to deliver was inferred from possession of a quantity of narcotics, at least one additional factor must be present. State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). For example, an observation of a drug transaction along with possession of

a quantity of narcotics, and possession of a large amount of money would be sufficient evidence of intent to deliver. Id. at 484. Other factors include an informant's tip combined with a large quantity of drugs or cut and uncut drugs, a cutting substance for the drugs, and packaging materials. Id. at 484. When no delivery is observed, but a large amount of cash is discovered, in addition to possession, it is sufficient to establish intent to deliver. State v. Lopez, 79 Wn. App. 755, 769, 904 P.2d 1179 (1995), disapproved on other grounds, State v. Adel, 136 Wn.2d 629, 640, 965 P.2d 1072 (1998).

“Specific criminal intent may be inferred where a defendant's conduct plainly indicates the requisite intent as a matter of logical probability.” State v. Hutchins, 73 Wn. App. 211, 216, 868 P.2d 196 (1994); State v. Stearns, 61 Wn. App. 224, 228, 810 P.2d 41, rev. denied, 117 Wn.2d 1012 (1991).

In the present case, the defendant was stopped after providing a police informant with crack cocaine. When he was contacted, there were pieces of paper with the letter “C” and a telephone number on them, similar to the piece of paper used by the informant to arrange the buy. The defendant also had a digital scale and crack cocaine secreted in various locations, including his pants and vehicle.

As argued above, there was evidence that the defendant sold cocaine to an informant. An observation of a drug transaction along with possession of drugs and money is sufficient evidence of intent to deliver. See, State v. Brown, supra. In this case, while the physical exchange between the defendant and the informant was not observed, officers did observe the informant, who was not in possession of any narcotics, get into a vehicle with the defendant and return with drugs. Officers also recovered the prerecorded money that the informant had been provided in the defendant's possession.

First, the informant arranged the transaction using a telephone number on a piece of paper that had a "C" on it, and the defendant possessed several similar pieces of paper. There was also other evidence that the defendant intended the drugs in his possession. A digital scale was also recovered which, when viewed in combination with the other evidence, establishes that the defendant intended to deliver the cocaine in his possession. Finally, the drugs were recovered not only from the defendant's vehicle, but from his person. There was sufficient evidence, when viewed as a whole, to establish that the defendant intended to deliver the drugs in his possession.

2 THE DEFENDANT WAS “ARMED” WITH A FIREARM THAT WAS EASILY ACCESSIBLE AND READILY AVAILABLE FOR USE WHEN THE OPERABLE, LOADED, FIREARM WAS FOUND AT THE DEFENDANT’S FEET AND THE DEFENDANT ACKNOWLEDGED TO POLICE THAT THE FIREARM WAS THERE.

“‘A person is ‘armed’ if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes,’ and there is a connection between the defendant, the weapon, and the crime.” State v. Easterlin, 159 Wn.2d 203, 208-209, 149 P.3d 366 (2006) (quoting State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). This connection, or “nexus,” is definitional, and “is not an element the State must explicitly plead or prove.” Easterlin, 159 Wn.2d at 209. Furthermore, “[t]he State does not have to produce direct evidence of a defendant’s intent.” Id. at 210. It is the defendant’s burden to establish, against all inferences in favor of the State, that this nexus did not exist. State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007). If the facts and circumstances support the inference that there is a nexus, that is sufficient evidence to support a finding that the defendant was armed. Easterlin, 159 Wn.2d at 210.

The present case is most similar to Easterlin. Officers found Easterlin asleep in his vehicle with a gun in his lap and a loaded magazine on the passenger seat. Id. at 207. Easterlin also had cocaine in his sock. Id. Easterlin pled guilty to unlawful possession of cocaine with a firearm

enhancement and unlawful possession of a firearm, and specifically conceded that he possessed a controlled substance and that he had a firearm with him. Id.

On appeal, Easterlin argued that there was not sufficient evidence to support the enhancement. Id. at 210. The Supreme Court upheld the firearm enhancement, citing defendant's admission that he was armed and possessed cocaine as supporting the inference that a nexus existed between the cocaine, the defendant, and the gun: "There was also ample evidence from which a trier of fact could find Easterlin was armed to protect the drugs... Easterlin's statement on plea of guilty specifically admitted, in his own words, that he was armed and that he possessed a controlled substance." Id. The court expressed one concern regarding actual possession cases, that a restrictive jury instruction may limit the defendant's ability to argue his theory of the case, a concern the court repeated in Eckenrode. Id. at 209; Eckenrode, 159 Wn.2d at 496. Otherwise, "[t]he State is likely correct that in actual possession cases, it will rarely be necessary to go beyond the commonly used 'readily accessible and easily available' instruction." Id.

In the present case, the jury was instructed that in order to find that the defendant was armed with a firearm, they had to find that the firearm was easily accessible and readily available for offensive or defensive purposes. CP 16-46 (Instruction #27). The defendant is not challenging

the jury instructions that were given, and the defendant was free to argue to the jury that the firearm was not easily accessible and readily available.

The firearm at issue was not on the passenger seat, as in Easterlin, but actually at the defendant's feet in the vehicle³. (2/8/07) RP 44. The firearm was loaded when it was recovered. (2/8/07) RP 45. From where the firearm was located, the defendant could have simply reached down and grabbed the gun off of the floor for immediate use. (2/8/07) RP 59. Moreover, the defendant acknowledged to police that the gun was present by telling Officer Conlon that he knew the firearm would be found and that he was not trying to hide it. (2/8/07) RP 49. The defendant also told police that some of the rounds had fallen out of the gun⁴. Id. This evidence alone supports the trial court's finding that defendant was "armed" while possessing the drugs. Clearly, the firearm located at the defendant's feet was easily accessible and readily available for use.

Beyond that, defendant asserts that the nexus cannot be established, because there was no evidence that the defendant owned the firearm, placed it in the vehicle, or even handled it. Brief of Appellant at page 11. The State is not required to show that the defendant owned,

³ The defendant was also convicted of unlawful possession of a firearm in the second degree. CP 47-50. The defendant is not challenging that conviction and appears to be conceding that he had possession of the firearm.

⁴ While the defendant testified at trial that there was no firearm on the floorboard of the vehicle, clearly the jury did not find his testimony credible. Credibility determinations are not subject to review. See, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

placed, or handled the firearm. Rather, the State must establish that the firearm is easily accessible and readily available for use, which it was. By the defendant's own admission, he knew the gun was in the vehicle.

The defendant also asserts that there is no evidence to suggest that the firearm was connected to the crimes of delivery of a controlled substance or possession with intent to deliver a controlled substance. Brief of Appellant at page 11. Such argument is without merit. As the court reasoned in Easterlin, the firearm could be used to protect the drugs. Easterlin, 159 Wn.2d at 210. Similarly, the evidence suggests that the defendant had an easily accessible firearm available to protect the drugs he was preparing to sell. There was sufficient evidence presented to establish that the defendant was armed with a firearm at the time of the underlying crimes.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that the defendant's convictions be affirmed.

DATED: December 5, 2007.

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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.

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