

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *JS*
DEPUTY

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

NO. 37810-8-III

STATE OF WASHINGTON,

Respondent.

vs.

ANDREW SKYBERG

Appellant.

On Appeal from the Superior Court of Lewis County

STATE'S RESPONSE BRIEF

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STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

ARGUMENT

A. Substantial Evidence Supports the Conclusion That Andrew Skyberg Possessed Methamphetamines.

Mr. Skyberg raises three issues on appeal. In his first, he claims that the evidence offered at trial was insufficient to permit a trier of fact to establish the elements of the crime of possession of methamphetamines. This argument is not persuasive.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The state is not required to convince the reviewing court that the defendant was guilty beyond a reasonable doubt – just that a rational trier of fact could so conclude. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn from it. *Salinas*, 119 Wn.2d at 201, 829

P.2d 1068. The reviewing 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 (1992). Circumstantial evidence is given equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). As further explained below, sufficient evidence was presented in this case to support both convictions.

Mr. Skyberg claims that the state lacked sufficient proof that he was in possession of a bag of methamphetamines. Notably, Mr. Skyberg does not challenge the trial court's admission of the bag into evidence. At trial, he did not object to the foundation for the bag's admission or to its relevancy. RP 36. But on appeal, he argues that there was insufficient evidence to connect the tested bag of methamphetamines to the bag found near him at his arrest.

More specifically, Mr. Skyberg argues that the state failed to establish that the bag the arresting officers located upon arrest was the same one that tested positive for methamphetamines. Or conversely, he argues, the state failed to prove that the bag that tested positive was the bag discovered near the scene of arrest. His arguments ignore the law's allowance for inferences from the

state's evidence and the equal standing given circumstantial evidence. When looked at in the light most favorable to the state, the state's evidence here provides sufficient basis from which the court could infer Mr. Skyberg's possession of methamphetamines.

Mr. Skyberg's argument centers on the chain of custody of the bag of white substance found at the crime scene. First, he argues that there is insufficient proof that it was provided to the evidence officer, officer Lowery. But the arresting officer, officer Warren, testified that after he and Sergeant Fitzgerald found a "clear baggy of a crystal substance," Sergeant Fitzgerald picked it off the ground and "handed it off to Detective Lowery or one of the... street crimes investigators." RP 20-21. Sergeant Fitzgerald's testimony conflicts slightly with this statement; the Sergeant recalling that it was Officer Warren who collected the bag. RP 31. Detective Lowery's recollection supports the Sergeant's testimony. He recalled receiving the bag from Officer Warren:

"Q. Did you obtain any items from Officer Warren?"

A. I obtained some that he – that had been located, yes."

Q. Okay. I'm handing you what's been marked as identification number 1. Can you take a look at that, sire?

A. Yes, sire.

Q. And what is identification 1 or what is that item?

A. It's marked as item number 4 for our logging. It states methamphetamine, slash, amphetamine in a clear plastic baggy, crystalline material..." RP 34-35.

In either case, the testimony supports that the bag found by the officers at the arrest scene was provided to Detective Lowery. The fact that both officers did not agree as to who gave the bag to Detective Lowery does not obviate the court's verdict. While the disagreement diminishes the reliability of one of the officer's testimony, it does not eliminate proof that one officer provided the bag to the detective. The court had substantial evidence based upon the testimony of the officers to conclude that one officer – it doesn't matter which one – turned over a bag of crystalline material to the detective for processing.

The above exchange at trial also establishes the next link in the proof chain for proving Mr. Skyberg's possession of methamphetamines. It is clear from the testimony that the bag provided from Officer Warren to Detective Lowery is the one containing 5.6 grams of methamphetamines. At trial, Detective

Fitzgerald identified exhibit number 1, the bag that Mr. Skyberg stipulated contains methamphetamines, immediately after acknowledging that he obtained an item from Officer Warren,. There was no other bag of methamphetamines admitted into evidence, or even referenced at trial. Indeed, there were only two pieces of evidence admitted at trial, the lab test results and the bag of methamphetamines. The item that Officer Warren and Officer Fitzgerald testified finding was a clear plastic baggy with white crystalline powder inside of it. 4/24/08 RP 20-21, 29. The bag identified by Detective Lowery fit this same description. 4/24/08 RP 35.

Additionally, Detective Lowery's testimony regarding his discussion with Mr. Skyberg at the crime scene supports an inference that Exhibit 1 is the bag found near him upon arrest. Detective Lowery testified that he showed or spoke about Exhibit 1 to Mr. Skyberg near the time of the arrest. In response to a question regarding "the 5.6 grams" of methamphetamines -- the same amount as the detective identified were in Exhibit 1 -- Detective Lowery described Mr. Skyberg's reaction to the confrontation. Detective Lowery testified that Mr. Skyberg stated repeatedly that "it wasn't on me." 4/24/08 RP 41. Based upon this

reference to the amount of methamphetamines in the bag, the court could conclude that the bag Detective Lowery showed to the defendant at the time of arrest was the same as the one admitted as Exhibit 1.

Thus, there was no reason for the trial court to conclude that Detective Lowery was identifying anything but the bag that officers Warren and Fitzgerald had obtained. The court was well within the bounds of the standard of proof to infer that exhibit 1, the bag containing methamphetamines, was the item provided to Detective Lowery from Officer Warren.

B. Finding of Fact Six Was Supported by Substantial Evidence.

Mr. Skyberg continues his sufficiency of the evidence claim by challenging the trial court's sixth finding of fact. He claims that the finding is in error if it refers to the bag of crystalline material seized by officers Warren and Fitzgerald. He notes that both officers denied picking up the bag and giving it to Detective Lowery. This is incorrect. Officer Warren testified that Officer Fitzgerald picked up the bag and delivered it to Detective Lowery while Officer Fitzgerald testified that Officer Warren was the one that took

possession of it. 4/24/08 RP 21 & 31. Moreover, the Detective testified that he received an item from Officer Warren and the record supports an inference that this item was the bag located by both officers. This testimony sufficiently supports the finding of fact.

C. The Defendant Knowingly, Intelligently, And Voluntarily Waived His Right To A Jury.

Mr. Skyberg claims that his waiver of a jury trial was ineffective because he was not apprised of his rights and the consequences of waiver. This argument is misguided. Mr. Skyberg was adequately informed of his right to a jury and the potential results if he chose to surrender that right. 8/17/08 RP 1-2. The instruction given to Mr. Skyberg by the trial court was sufficient to comply with the Sixth Amendment requirements. In respect to that Amendment, this court found that

"To meet constitutional muster, the record must affirmatively show that the defendant knew of the right to a jury trial and personally and expressly waived it. These requirements are implemented by CrR 6.1(a), which requires a written waiver of a defendant's right to a jury trial." *State v. Brand*, 55 Wn.App. 780, 785, 780 P.2d 894 (1989).

These requirements were met here. The court informed Mr. Skyberg of his right to a jury trial, it discussed the differences between a bench and a jury trial, Mr. Skyberg orally waived his right, and the waiver was also memorialized. 8/17/08 RP 1-2. No more was needed. See State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994) (an explanation of the consequences of waiver is not required to be placed on the record).

CONCLUSION

This court should affirm the defendant's conviction.

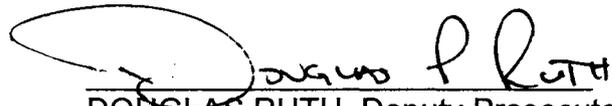
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DECLARATION OF MAILING

DOUG RUTH, Deputy Prosecutor for Lewis County, Washington, on behalf of Respondent State of Washington, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: on MARCH 16 I served a copy of the RESPONSE BRIEF upon the Appellant by depositing the same in the United States Mail, postage pre-paid, addressed to the attorney for the Appellant addressed as follows:

John A. Hays
1402 Broadway
Suite 103
Longview, WA 98632

Dated this 16 day of March, 2009, at Chehalis, Washington.


DOUGLAS RUTH, Deputy Prosecutor
WSBA No. 25498
Attorney for the Respondent

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