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STATUTES

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in refusing Smith's request for an instruction on the statutory affirmative defense to the school-zone sentence enhancement where there was no evidence in the record that his sale and delivery of methamphetamine was *not* for profit?

2. Whether the trial court properly found that Smith used a motor vehicle in the commission of the crime where he accepted money for drugs, and then asked the purchaser to wait while he got in his car and drove to another location and returned with the methamphetamine?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Michael Smith was charged by amended information filed in Kitsap County Superior Court with delivery of methamphetamine in a school zone. CP 26. Smith was tried jointly with codefendant Valentino Lucero. 1RP 2.

The initial trial ended in a mistrial. 3RP 114. At the conclusion of the second trial, the defense jointly sought an instruction based on WPIC 50.60.01. RP (5/30) 56, CP 136.¹ The instruction is based on the affirmative defense set forth at RCW 69.50.435(4), which requires the defense to prove

¹ The report of proceedings cites to a non-existent WPIC 56.60.01. The proposed instruction has the correct citation.

by a preponderance, *inter alia*, that the transaction was not for profit. The State objected to both the form of the proposed instruction, and that there was “zero evidence” of an absence of profit motive. RP (5/30) 56-58. The trial court agreed, and declined to give the instruction. RP (5/30) 58.

The jury found Smith guilty as charged. CP 120, 121. At sentencing, the trial court made a finding, over Smith’s objection, that the crime involved the use of a motor vehicle. RP (7/11)13.

B. FACTS

Confidential informant Chastin Hoffman contacted Bremerton Police Special Operations Group Detective Jonathan Meador and said he could buy methamphetamine from the defendants, Michael Smith and Valentino Lucero. RP (5/29) 23, 30. Meador, along with Detectives Garland and Elton, met with Hoffman, searched him and his car, gave him \$120.00 in pre-recorded money and set up surveillance. RP (5/29) 31, 33.

Hoffman drove his car to an apartment building. RP (5/29) 33. Meador parked across the street at the Bremerton Police Department’s former west precinct building, which was empty. RP (5/29) 35. He watched Hoffman walk from his car and into an apartment on the lower level of the building. RP (5/29) 35.

The police observed two individuals, subsequently identified as the defendants Smith and Lucero, arrived in a large vehicle and also went into the apartment. RP (5/29) 36, 43, 49, 108. Smith told Hoffman they would have to go somewhere else to pick up the drugs. RP (5/29) 104. Hoffman gave the money to Smith, who said they would be back in about 20 minutes. RP (5/29) 104.

Hoffman and the defendants exited the apartment. RP (5/29) 36. The defendants got into the sport utility vehicle and left. RP (5/29) 36.

Meador contacted Hoffman and asked him what the other two were doing. RP (5/29) 37. Hoffman said that they took the money and went elsewhere to get the drugs. RP (5/29) 37. Hoffman returned to the apartment. RP (5/29) 37.

Detective Martin Garland followed the SUV, and lost it in traffic, but eventually sighted it. RP (5/30) 34. The truck was parked. RP (5/30) 34. Then the defendants appeared, got in, and drove back to the apartment. RP (5/30) 34.

The defendants re-entered the apartment. RP (5/29) 37. Lucero handed Hoffman a baggie. RP (5/29) 105. Hoffman "loaded them a bowl" as a thank you. RP (5/29) 104. Hoffman then left. RP (5/29) 105.

After Hoffman came out, the police followed him to a secure location.
RP (5/29) 37. Hoffman and his vehicle were searched again. RP (5/29) 38.

Meador recovered the drugs from Hoffman's wallet. RP (5/29) 38.
Laboratory testing confirmed that the substance was methamphetamine. RP
(5/29) 170.

It was also established that a school bus stop was within 307 feet of
the apartment. RP (5/29) 51-53, 58, 93; RP (5/30) 4.

III. ARGUMENT

A. SMITH WAS NOT ENTITLED TO AN INSTRUCTION ON THE STATUTORY AFFIRMATIVE DEFENSE TO THE SCHOOL-ZONE SENTENCE ENHANCEMENT WHERE THERE WAS NO EVIDENCE IN THE RECORD THAT HIS SALE AND DELIVERY OF METHAMPHETAMINE WAS NOT FOR PROFIT.

Smith argues that the trial court erred in refusing his request instruction for an instruction on the statutory affirmative defense to the school zone sentencing enhancement. This claim is without merit because there is no evidence in the record supporting one of the elements of the defense: that the transaction not have been for profit.

This Court reviews a trial court's decisions regarding jury instructions for an abuse of discretion. *State v. Lucky*, 128 Wn .2d 727, 731, 912 P.2d

483 (1996), *overruled on other grounds*, *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). A defendant has the right to present his theory of the case to the jury. *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). However, a defendant is entitled to have the jury instructed as to an affirmative defense only if there is sufficient evidence in the record to support it. *State v. Allery*, 101 Wn.2d 591, 598, 682 P.2d 312 (1984).

RCW 69.50.435(4) sets forth the affirmative defense sought below:

It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

WPIC 50.61.01 reduces the essence of the defense to the following questions:

Has the defendant proved by a preponderance of the evidence that

- (a) the defendant's conduct took place entirely within a private residence; and
- (b) no person under eighteen years of age was present in the private residence at any time during the commission of the offense; and
- (c) the defendant's conduct did not involve delivering, manufacturing, selling, or possessing with the intent to

manufacture, sell, or deliver any controlled substance for profit?

The State would concede that the evidence of the first two elements of the defense was sufficient to support an instruction on the defense. It is on the third, however, that Smith's argument flounders.

There simply is no evidence, under any definition of the term, that the transaction was not for profit. The only evidence is Hoffman's uncontradicted testimony that in exchange for \$120.00 and "a bowl" of methamphetamine, the defendants provided Hoffman with a quantity of methamphetamine. There is no evidence that the defendants were providing the drugs for anything but profit. There is no evidence as to the defendant's cost in procuring the methamphetamine. Notably, however, the methamphetamine delivered was "light." That is, they produced significantly less methamphetamine than ordinarily sold for \$120.00. RP(5/29) 32, 73, 103, 131. Whether that means that the defendants pocketed some of the meth they bought for Hoffman, or whether they paid their supplier less than \$120, pocketing the difference, is unknown. But the implication certainly is that someone was making a profit.

Smith essentially argues that the State failed to prove that transaction was for profit. However, Smith's argument significantly overlooks the burden of proof for the affirmative defense. That burden lies with the

defense. *State v. Lua*, 62 Wn. App. 34, 42, 813 P.2d 588, *review denied*, 117 Wn.2d 1025 (1991), *overruled on other grounds*, *State v. Coria*, 120 Wn.2d 156, 839 P.2d 890 (1992). Because there was no evidence showing an *absence* of profit, the trial court did not abuse its discretion in denying the instruction.

Smith makes much of the definition of the term “profit.” He argues that the trial court erred because it relied upon an incorrect definition of the term. This contention fails for several reasons.

First, and most importantly, as alluded to above, under any definition of the term, there is simply no evidence that the transaction was *not* for profit.

Secondly, this aspect of the claim was raised, and then specifically withdrawn, below. As such it is waived. *State v. Myers*, 133 Wn.2d 26, 35, 941 P.2d 1102 (1997). The request for the instruction was presented as “a joint defense motion.” RP (5/30) 56. The State argued that profit was defined in WPIC 50.17. RP (5/30) 57. Counsel for Smith did not respond to this contention. RP (5/30) 57. Lucero’s attorney argued that the WPIC did not define profit, so the term therefore had its ordinary meaning. RP (5/30) 57. In response, the State proffered the WPIC definition, whereupon counsel stated he would “withdraw [his] statement.” RP (5/30) 58. Having specifically withdrawn the objection to the definition, Smith cannot now argue that the trial court abused its discretion in using that definition.

Finally, an instructional error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Here, because there simply was no evidence at all that the transaction was not for profit, the jury would have had no basis to conclude that the defense had been proven by a preponderance of the evidence, even if the trial court did abuse its discretion. Smith's sentence enhancement should be affirmed.

B. THE TRIAL COURT PROPERLY FOUND THAT SMITH USED A MOTOR VEHICLE IN THE COMMISSION OF THE CRIME WHERE HE ACCEPTED MONEY FOR DRUGS, AND THEN ASKED THE PURCHASER TO WAIT WHILE HE GOT IN HIS CAR AND DROVE TO ANOTHER LOCATION AND RETURNED WITH THE METHAMPHETAMINE.

Smith next claims that the trial court erred in finding that Smith used a motor vehicle in the commission of the crime. This claim is without merit where Smith accepted money for drugs, and then asked the purchaser to wait while he got in his car and drove to another location and returned with the methamphetamine.

RCW 46.20.285(4) requires the Department of Licensing to revoke the license of any driver for the period of one calendar year upon receiving a record of the driver's conviction of any felony in the commission of which a motor vehicle is used. Accordingly, the trial court made a finding, included

in the judgment and sentence, that Smith's offense involved the use of a motor vehicle. RP (7/11)13; CP 130.

In analyzing the statute's applicability to the crimes of unlawful possession of a controlled substance and unlawful possession of a firearm, the Supreme Court has held that the relevant test for "use" is whether the felony has some reasonable relation to the operation of a motor vehicle, or whether the use of the motor vehicle contributes in some reasonable degree to the commission of the felony. *State v. Batten*, 140 Wn.2d 362, 365, 997 P.2d 350 (2000). Applying this test, the courts have found "use" where the the commission of a felony directly involves motor vehicle operation. *E.g. State v. Dykstra*, 127 Wn. App. 1, 12, 110 P.3d 758 (2005) (defendant was part of an auto theft ring and cars were stolen, driven around to find other cars to steal, and used during lookout operations); *State v. Griffin*, 126 Wn. App. 700, 708, 109 P.3d 870 (2005)(use of a car directly contributed to the commission of the crime of cocaine possession where the appellant received cocaine in exchange for giving someone a ride in the car). Likewise, for a possession crime, the courts have found a sufficient nexus to invoke the statute where the defendant used a vehicle as a repository to store contraband. *Batten*, 140 Wn.2d at 366 ("Employing a vehicle as a place to store and conceal the weapon, in our judgment, creates a sufficient relationship between the use of the vehicle and the crime of unlawful possession of the

weapon to bring the possession of the weapon within the reach of the statute”).

On the other hand, the courts have held that RCW 46.20.285(4) does not apply where the vehicle was incidental to the commission of the crime. *See State v. Wayne*, 134 Wn. App. 873, ¶¶ 9-10, 142 P.3d 1125 (2006) (finding that, while the use of a car to conceal a controlled substance fell within the meaning of the license revocation statute, the statute did not apply where the contraband item was found on the appellant’s person because there was no reasonable relationship between the crime of possession and the vehicle, and the vehicle itself did not contribute in some reasonable degree to the commission of the felony); *State v. Hearn*, 131 Wn. App. 601, ¶ 19, 128 P.3d 139 (2006) (*Batten* criteria were not met for the crime of possession where drug paraphernalia was found in the appellant’s belongings inside the vehicle, but the vehicle itself was not used to store or conceal the contraband); *State v. B.E.K.*, 141 Wn. App. 742, 172 P.3d 365 (2007) (suspension provision not apply to malicious mischief perpetrated on a police vehicle, because although the vehicle was the object of the crime, its operation did not contribute to the commission of the crime; it was not the instrumentality of the crime).

Here, the use of the vehicle was not incidental. The defendants arrived by car at the location of the transaction. They accepted money from

the informant, and then left again in the vehicle to get the drugs. They went to a location across town, apparently obtained the drugs, and then returned to the location of the sale, where they delivered the methamphetamine to the informant. Under these facts, the use of the motor vehicle clearly contributed in some reasonable degree to the commission of the felony. Indeed, but for the use of the vehicle, it appears that the crime would not have been completed. The *Batten* standard is met, and the trial court's finding should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Smith's conviction and sentence should be affirmed.

DATED March 22, 2009.

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