

FILED

MAR 21 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 289907

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

STATE OF WASHINGTON,

Respondent,

v.

MAYIRA (NMI) BALENCIA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
Klickitat County, STATE OF WASHINGTON
Superior Court No. 09-1-00033-8

BRIEF OF RESPONDENT

LORI LYNN HOCTOR
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JESSICA M. MAXWELL
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A. COUNTERSTATEMENT OF THE ISSUES

1. Whether sufficient evidence was provided to allow a rational trier of fact to find the defendant guilty of delivery of a controlled substance beyond a reasonable doubt.
2. Whether delayed filing of the findings of fact and conclusions of law prejudiced the defendant, thereby requiring dismissal.

B. STATEMENT OF THE CASE

PROCEDURAL HISTORY

On February 19, 2009, the State filed an information in Klickitat County Superior Court charging defendant, Mayira Balencia, with Violation of the Uniform Controlled Substance Act – Delivery of a Controlled Substance (Methamphetamine), RCW 69.50.401, and Unlawful Use of a Building for Drug Purposes, RCW 69.53.010, alleged to have occurred on September 29, 2008. CP 1-2. Balencia entered into the “Drugs No More” Diversion Program (“drug court”) on May 8, 2009. She was revoked from drug court on March 15, 2010. CP 65; RP (03/15/10) at 3-4.

Following her drug court revocation, the Court held a stipulated bench

trial March 29, 2010 on the underlying charges, and found Ms. Balencia guilty of Violation of the Uniform Controlled Substance Act – Delivery of a Controlled Substance (Methamphetamine), RCW 69.50.401. RP (03/29/10) at 6. The Court sentenced Ms. Balencia on April 19, 2010 to “a year and a day,” the low end of the standard range of confinement. CP 48-51; RP (04/19/10) at 4-5. Ms. Balencia timely filed her Notice of Appeal on April 19, 2010. CP 56.

SUBSTANTIVE FACTS

On September 29, 2008, officers with the Klickitat County Sheriff’s Office and the Mid-Columbia Interagency Narcotics Team coordinated a controlled narcotics buy through two confidential informants (“informants”). The officers met with the informants, searched them and their vehicles for controlled substances, and provided them with two marked \$50 bills. Ex. 1 (Probable Cause Declaration and Investigation Report [“Police Reports”] and Handwritten Officer’s Notes). Two officers followed the informants to an apartment complex and watched while they approached and entered Ms. Balencia’s apartment. Ex. 1 (Police Reports). The informants then gave Ms. Balencia the buy money and she subsequently left the apartment with her young child and walked through the parking lot to the entrance. Ex. 1 (Police

Reports and Handwritten Officer's Notes). A short time later, Ms. Balencia returned to the parking lot as a passenger in a car. Ex. 1 (Police Reports and Handwritten Officer's Notes). She got out of the car and returned to the apartment. Ex. 1 (Police Reports and Handwritten Officer's Notes). Inside the apartment, Ms. Balencia handed the suspected methamphetamine to one of the informants. Ex. 1 (Handwritten Officer's Notes). An officer followed the informants as they left the apartment complex and retrieved the substance from them. Ex. 1 (Police Reports and Handwritten Officer's Notes). A second officer searched the informants and their vehicle and found "nothing." Ex. 1 (Handwritten Officer's Notes). The first officer field tested the substance he retrieved from the informants and eventually sent it to the Washington State Patrol (WSP) Crime Laboratory. Ex. 1 (Request For Laboratory Examination). Both the field test and the tests conducted by the WSP crime laboratory positively identified the substance as methamphetamine. Ex. 1 (Police Reports and WSP Crime Laboratory Report).

C. ARGUMENT

1. SUFFICIENT EVIDENCE WAS PROVIDED TO ALLOW A RATIONAL TRIER OF FACT TO FIND THE DEFENDANT GUILTY OF DELIVERY OF A CONTROLLED SUBSTANCE BEYOND A REASONABLE DOUBT.

To convict the Ms. Balencia of delivery of a controlled substance, the State had to prove beyond a reasonable doubt that on or about the 29th day of September, 2008, in Klickitat County, Washington, she knowingly transferred a controlled substance from one person to another. CP 1-2; RCW 69.50.101(f); The State met this burden. RP (03/29/10) at 6.

Ms. Balencia challenges the sufficiency of the evidence of the actual transfer. Highlighting a passage from the Statement of Probable Cause, she focuses a large part of her argument on an obvious typographical error. Brief of Appellant at 7-8. In her remaining argument, Ms. Balencia asks this Court to reweigh the trial evidence. Brief of Appellant at 9-10. Her request must be denied.

De novo is not the proper standard of review. The standard of review for appeals of criminal trials on stipulated records is “substantial evidence.” *State v. Bartolome*, 139 Wn. App. 518, 161 P.3d 471 (2007). The appellate court shall “leave it to the trial court to weigh . . . conflicting stipulated

evidence and to resolve factual disputes.” *Id.* at 522.

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. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). “In a stipulated facts trial, the judge or jury still determines the defendant's guilt or innocence; the State must prove beyond a reasonable doubt the defendant's guilt; . . . but in essence [the defendant], by the stipulation, agrees that what the State presents is what the witnesses would say.” *State v. Johnson*, 104 Wn.2d 338, 342, 705 P.2d 773, 775 (1985). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Applying the appropriate standard of review, there is ample evidence from which a rational trier of fact could find Ms. Balencia guilty.

The crime of delivery of a controlled substance is the knowing physical transfer of a controlled substance from one person to another, *State v. Evans*, 80 Wn. App. 806, 814, 911 P.2d 1344 (1996), *review denied* 129 Wn.2d 1032, 922 P.2d 97. Delivery can be actual or constructive. RCW 69.50.101(f).

Viewed in a light most favorable to the State, the facts presented to the trial court clearly support a finding of actual transfer of a controlled substance. Ms. Balencia left the apartment with money that the informants gave her to buy methamphetamine. Ex. 1 (Police Reports and Handwritten Officer's Notes). She left the apartment and the parking lot, apparently made contact with someone else, and returned as the passenger in that person's car. Ex. 1 (Police Reports and Handwritten Officer's Notes). She went back into the apartment and gave the confidential informants the substance that later tested positive as methamphetamine. Ex. 1 (Handwritten Officer's Notes, Police Reports and WSP Crime Laboratory Report).

There does appear to be some conflicting information in the police reports. The last paragraph of the deputy's handwritten notes states "1969 said Myra left w/ child walked down with money. Myra came back in reddish burgundy car with dope. She came in and handed 1967 the dope." Ex. 1 (Handwritten Officer's Notes). When the deputy wrote the statement of probable cause and investigative narrative from his notes, he substituted the word "money" into where he had written "dope" in his notes – "CI 1969 said Balencia left with her child and the buy money. CI 1969 said Balencia came back with dope in a reddish burgundy car. When Balencia came into the

apartment she handed CI 1967 the money.” Ex. 1 (Police Reports and Handwritten Officer’s Notes). Substitution of that one word, taken solely at face value, would completely change the meaning of the deputy’s report. In the context of the rest of the evidence in the police reports, however, it becomes obvious that the deputy did not intend to substitute “money” for “dope.” The trial court specifically addressed that discrepancy when it found that “the confidential informants apparently would have testified had they been called that they had received the . . . methamphetamine from Ms. Balencia.” RP (03/29/10) at 6. Because the trial court resolved this factual dispute, it would be improper for an appellate court to reweigh the evidence. *State v. Bartolome*, 139 Wn. App. 522, 161 P.3d 471 (2007). Further, the inference from the evidence that the word “money” was mistakenly substituted for “dope” must be drawn in favor of the State. Clearly there is sufficient evidence for a rational trier of fact to find Ms. Balencia guilty of delivery of a methamphetamine.

2. BECAUSE THE DEFENDANT WAS NOT PREJUDICED BY DELAYED ENTRY OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW, HER CONVICTION MUST BE AFFIRMED.

Ms. Balencia next claims that the case should be reversed and dismissed because the trial court failed to enter written findings of fact and conclusions of law as required by CrR 6.1(d). The defendant's claim is without merit because written findings of fact and conclusions of law were entered by the trial court on February 28, 2011. Because the defendant was not prejudiced by the delay in filing, her conviction must be affirmed.

CrR 6.1(d) requires that written findings of fact and conclusions of law be entered in cases tried without a jury. The purpose of requiring written findings and conclusions is to ensure efficient and accurate appellate review *State v. McGary*, 37 Wn. App. 856, 861, 683 P.2d 1125, review denied, 102 Wn.2d 1024 (1984). The rule gives no guidance as to time in which findings and conclusions must be filed, but the Supreme Court held that although late filing of facts and conclusions is disfavored, such filing is permissible even while appeal is pending as long as the defendant is not prejudiced. *State v. Cannon*, 130 Wn.2d 313, 922 P.2d 1293 (1996).

The factual scenario involving delayed findings in *Cannon* is directly on point with the facts in this case. Cannon was convicted of rape in the first

degree after a bench trial. *Id.* at 323. For the first time on appeal, he argued that his conviction should be reversed and dismissed because the trial court failed to enter findings and conclusions until nearly two years after his trial. *Id.* at 329. He argued that the delay was particularly prejudicial because the findings and conclusions weren't entered until after he had filed his opening brief. *Id.* In rejecting Cannon's argument, the Court held:

Here, it is apparent that no prejudice flowed to Cannon because of the late filing of findings and conclusions. Significantly, the appeal was not delayed by the late filing. Although Cannon asserts that it was unfair to allow the entry of findings after he had framed the issues and argument in his brief, a comparison of the late-filed findings and conclusions with the trial court's oral ruling shows that the State did not tailor or alter the findings and conclusions to meet issues and arguments raised by Cannon in his brief submitted to the Court of Appeals. *State v. Cannon*, 130 Wn.2d at 330.

The same result must be reached here. The purpose behind the rule was effected despite late filing. As in *Cannon*, late filing did not delay this appeal. The findings and conclusions in this case, as in *Cannon*, are consistent with the Court's oral ruling and not tailored toward arguments raised by the defendant.

The defendant also appears to argue that she was prejudiced by "lack of notice" as to what the findings of fact and conclusions of law would be in that she was unable to evaluate the factual basis for each

conclusion of law. Brief of Appellant at 12. This claim is also without merit because the findings and conclusions were drawn directly from the Court's oral ruling and contain no evidence other than what was stated therein. The defendant has failed to demonstrate any grounds on which she was prejudiced by delayed entrance of the findings and conclusions. Under *Cannon*, her request for dismissal must be denied and her conviction affirmed.

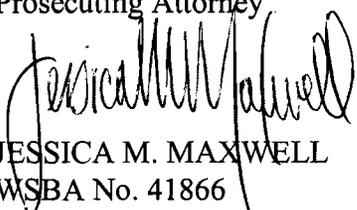
D. CONCLUSION

For the foregoing reasons, the State respectfully submits that Ms. Balencia's conviction and sentence must be affirmed.

DATED March 17, 2011.

Respectfully submitted,

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