

FILED
September 20, 2016
Court of Appeals
Division III
State of Washington

NO. 33821-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LOUIS VILLANUEVA,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-iii
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
1. The evidence was insufficient to prove appellant delivered a controlled substance within 1,000 feet of a school bus route stop. Was the evidence insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route enhancement, where there was no proof of the seating capacity of the school buses?	1
2. Appellate costs should not be imposed.....	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
1. The evidence presented at trial was sufficient to support the charge of possession with intent to deliver as charged as well as the school bus stop enhancement.....	1
2. The State has not at this time requested appellant costs therefore this allegation should be denied.	
II. <u>STATEMENT OF THE CASE</u>	1
III. <u>ARGUMENT</u>	1
IV. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

PAGE

Cases

State v. Brooks, 45 Wn.App. 824, 727 P.2d 988 (1986) 6

State v. Bucknell, 183 P.3d 1078, 1080 (2008) 7

State v. Calvin, 176 Wn.App. 1, 316 P.3d 496 (2013) 8-9

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 7

State v. Dejarlais, 88 Wash.App. 297, 944 P.2d 1110 (1997),
aff'd, 136 Wash.2d 939, 969 P.2d 90 (1998) 7

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)..... 6

State v. Eaton, 164 Wn.2d 461, 191 P.3d 1270 (2008)..... 4

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 6

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) 7

State v. Longuskie, 59 Wn.App. 838, 801 P.2d 1004 (1990) 7

State v. Myers, 133 Wn.2d 26, 941 P.2d 1102 (1997)..... 7

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 6

State v. Sinclair, 192 Wn.App. 380, 367 P.3d 612 (quoting RAP 14.2)
review denied, 185 Wn.2d 1034 (2016)..... 11-12

State v. Stritmatter, 102 Wn.2d 516, 688 P.2d 499 (1984)..... 4

State v. Tvedt, 153 Wn.2d 705, 107 P.2d 728 (2005)..... 4

TABLE OF AUTHORITIES (continued)

PAGE

Supreme Court Case

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781,
61 L.Ed.2d 560 (1979) 6

Rules

RAP 10.3(b) 1
RAP 14.2 11-12

WPIC 50.61.01 4
WPIC 50.63 4
WPIC 50.64 4

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant has set forth one substantive assignment of error and one procedural. This is stated by Appellant as follows;

1. The evidence was insufficient to prove appellant delivered a controlled substance within 1,000 feet of a school bus route stop. Was the evidence insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses?
2. Appellate costs should not be imposed.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The evidence presented at trial was sufficient to support the charge of possession with intent to deliver as charged as well as the school bus stop enhancement.
2. The State has not at this time requested appellate costs therefore this allegation should be denied.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellant's brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed within the body of this brief.

III. ARGUMENT

The evidence presented was more than sufficient to support the charges and the enhancement against Appellant. Specifically that the

delivery was completed within 1000 feet of a school bus route stop.

The State needed to prove beyond a reasonable doubt that the deliveries occurred within 1,000 feet of a school bus route stop. The State offered the unrefuted testimony of two witnesses.

The first to testify, Blaine Thorington, is the transportation director for the Toppenish School District. Mr. Thorington testified that he was the individual who actually designated the school bus route stops for the area in question. RP 166. That he “shares” those designations with the Yakima County Geographical Information Section, (GIS). He testified that he generated a map that showed the location of the delivery and the radius of 1000 feet from “that property, 9-1/2 D Street. RP 171. Through the defendant’s own testimony that is the location of his home. RP 178. This was the location testified to as having been the location of the underlying crime. RP 74,77,83, 86, 111, 131, 133, 135.

The second witness Mike Martian, is the manager of the Geographic Information Systems (GIS) for Yakima County. RP 169–72.

The information charging this criminal act states as follows regarding the enhancement;

Furthermore, you committed this crime in a protected zone, and your penalty will be increased. (Protected zones are: in a school; and/or on a school bus; and/or within 1000 feet of a school bus route stop designated by a school district; and/or within 1000 feet of

the perimeter of school grounds; and/or in a public park; and/or in a public housing project designated by a local governing authority as a drug-free zone; and/or in a public transit vehicle; and/or in a public transit stop shelter; and/or at a civic center designated as a drug-free zone by the local governing authority; and/or within 1000 feet of the perimeter of a civic center designated as a drug-free zone if the local governing authority specifically designates the 1000 foot perimeter.) The court shall impose an additional 24 months to the standard sentence. The maximum penalty is 20 years imprisonment and/or a \$50,000.00 fine. (RCW 69.50.435 and 9.94A.533(6).)

As this court can see the enhancement is charged out in a manner which takes into account all of the possible options for enhancements which may attach to a drug related crime. There is no allegation that the State was required to prove each and every one of these “options.”

The only evidence that was testified to supports the option of school bus route stop **not** on or in a school bus. There was never any evidence presented that the act occurred on a school bus therefore the jury did not need the definitions given regarding what a “school bus” is and therefore they are surplusage. If Villanueva were able to demonstrate the surplusage was affirmatively misleading, it could have due process implications. There has been no demonstration by Appellant that he was prejudiced or mislead in any manner nor that there was any confusion on the part of the jury. In the analogous context of notice provided by a charging document, “[w]hen a surplus allegation varies between the

charging document and proof at trial, the variance requires reversal if it prejudices the accused either by misleading him in making his defense or by exposing him to double jeopardy." State v. Eaton, 164 Wn.2d 461, 470,191 P.3d 1270 (2008) (citing State v. Tvedt, 153 Wn.2d 705,718,107 P.2d 728 (2005); State v. Stritmatter, 102 Wn.2d 516,524,688 P.2d 499 (1984).

That this is surplusage is further supported by the fact that the note information contained within WPIC 50.64 "School Bus Route Stop – Definition" states "(WITHDRAWN) The instruction has been withdrawn. The instruction no longer serves much purpose following the Legislature's removal of a mapping requirement from the statutory definition of "school bus route stop.""

The indication that this definition was surplusage continues in the note on use following WPIC 50.63, "Use this instruction, as applicable, with WPIC 50.61, Enhanced Sentence—Controlled Substance Violations Under RCW 69.50.435—No Statutory Defense—Special Verdict, or WPIC 50.61.01, Enhanced Sentence—Controlled Substance Violations Under RCW 69.50.435—Statutory Defense—Special Verdict."

WPIC 50.61.01 is the "Enhanced Sentence—Controlled Substance Violations under RCW 69.50.435—Statutory Defense—Special Verdict" form WPIC.

This WPIC sets forth all of the possible questions which would be needed for the various special verdicts. Within this WPIC is the specific question which relates to an enhancement that is alleged to have occurred on an actual “school bus” and would have had to be presented to the jury if that had been alleged, it was not. If the State had alleged the deliver had occurred on a bus and that was the basis for the enhancement, then clearly the State would have been required to prove that the actual vehicle was a “school bus” per the legal definition. Once again, that was not the case as seen from the testimony and the record throughout this case.

There was never any indication from the record supplied by Appellant that the allegations regarding this criminal act occurred actually on a school bus. The allegation throughout was that the delivery occurred with the legally prohibited distance to a school bus route stop.

There is also no indication that Villanueva as confused about the basis for the enhancement nor is there any indication that he was prejudiced or mislead in his presentation of his case or his defense.

The special verdict form, the “to convict” for the enhancement, reads as follows;

This special verdict is to be answered only if the jury finds the defendant guilty of Deliver of Controlled Substance as charged in Count 1.

We the jury, return a special verdict by answering as follows:

Question: Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district? CP 77

Appellant challenges the sufficiency of the evidence to support the enhancement to his conviction. As with any challenge of this nature this court must view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One form of evidence is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt.

Circumstantial evidence and direct evidence are equally reliable.

State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wash.2d 939, 969 P.2d 90 (1998).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court need not “itself” be convinced beyond a reasonable doubt. State v. Bucknell, 183 P.3d 1078, 1080 (2008) follows this line of cases and additionally indicated "Credibility determinations are within the sole province of the jury and are not subject to review." State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).”

Appellant argues that under the law of the case doctrine, the definitional instruction that was submitted as instruction 19 (CP 71) is an element of the special verdict form when the State failed to object to the inclusion the added definition of a “school bus.” Although Villanueva correctly asserts that jury instructions not objected to become the law of the case typically the State assumes the burden of proving otherwise unnecessary elements **only** when those elements are incorporated in the "**to convict**" instruction. See State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900(1998) ("Under the doctrine jury instructions not objected to

become the law of the case.... In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction.") (citations omitted).

The "to convict" instruction here did not require the jury to find that Villanueva committed or intended to commit this crime on a bus, it required them to determine that his act occurred within 1000 feet of a school bus route stop. The "to convict" instruction only required the jury to conclude “[d]id the defendant deliver a controlled substance to a person within on thousand feet of a school bus route stop designated by a school district. CP 77 The law of the case doctrine does not apply here. Therefore, the State was not required to prove that any vehicle of any size stopped at “a school bus route stop” only that the location was so designated.

The State could only find one case that stated the law of the case doctrine could apply to definitional instructions in addition to "to convict" instructions and it is the State's position that this portion of that ruling is dicta. See State v. Calvin, 176 Wn. App. 1, 21, 316 P.3d 496 (2013) ("Although the State argues that the law of the Case doctrine applies only when an element is added to a to-convict instruction, the doctrine is not limited to that application. It is a broad doctrine that has been applied to

a to-convict instructions and definitional instructions.")

The circumstances in Calvin are inapplicable here. In Calvin the jury was confused about the term and during deliberations asked the trial Court how to define "unlawful force." Calvin, 176 Wn.App. at 20. The trial court decided to provide a supplemental instruction. The court in Calvin stated in passing that the law of the case doctrine might apply to definitional instructions in addition to "to convict" instructions, this statement is dicta because whether the presence of the phrase "unlawful force" added an element was not directly at issue in the case. The court based the opinion on the court's ability to submit an additional or new instruction to the jury. The court in Calvin did not hold that a phrase contained in a definitional instruction increased the State's burden by adding an otherwise unnecessary element. Calvin is also distinguishable because the jury instruction at issue there, defined the specific crime with which the defendant was charged. Here, Appellant was not charged with assault or theft. The related definitional instructions provided examples of crimes the jury could consider when deciding "the intent to commit a crime against a person nor property therein" for burglary. Here the issue is a definition that was unneeded surplusage.

APPELLATE COSTS

From the very first page of direct testimony of Villanueva there

was testimony about and reference to his work history and how he had always been a great worker. Thereafter there are no less than eleven references to this defendant's steady and productive work history. PR 176-8

There was a consensus from the family members who spoke at his sentencing that due to his drug use that work had suffered, however even the defendant's own attorney spoke of his steady employment history; MR. COTTERELL: --52 years old, has no prior felony history. He went to trial. The jury found him guilty of the underlying two charges, plus the school enhancement on this matter. He does have a loving family and he's a hard worker. He works in construction, and has always worked. And whenever I've -- he's always been out for -- doing this out of custody, and has always been working. And worked at the -- the tennis club over there, refurbishing that.

RP 264

...
MS. MIRES: My name is Guirea Mires. I'm Mike's daughter. Since this has happened, and since my dad's decided to turn his life around, he's rededicated his life to the Lord, he consistently goes to church with me and my family. He's worked full-time. RP 265-6

...
DAVID: And I am Mike's younger brother.

Since our childhood Mike has always been a protector. And has always looked after our family, the way -- that a big brother would.

We've spent many years working with my dad in our family construction company. RP 268

...
FATHER: I'm (Inaudible) Villanueva. I'm his father. (Inaudible) my son -
- my best worker at number one. You know, when we build a memorial in Terrace Heights, he would take care of my job, I take care of (inaudible), you know. But (inaudible) we build it, for the guys die in Vietnam and Korea war. (Inaudible) Villanueva. RP 270

THE COURT;...There's a \$500 penalty assessment, \$200 criminal filing fee, a \$600 court-appointed attorney recoupment, \$100 DNA collection fee, \$1,000 drug fine, \$250 drug enforcement fund contribution and \$100 crime lab fee for \$2,750. Costs of incarceration will be capped at \$500. I do make a finding that Mr. Villanueva does have the ability to pay -- testimony at the time of trial as to his -- and even now as to his -- as to his work history, the fact that he does work and has an ability to earn a wage, and consequently has an ability to pay -- some of the costs here. RP 275-6

State v. Sinclair, 192 Wn.App. 380, 385-86, 388-90, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016) "The commissioner or clerk "will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs

otherwise in its decision terminating review. "... When a party raises the issue in its brief, we will exercise our discretion to decide if costs are appropriate.... We base our decision on factors the parties set forth in their briefs rather than remanding to the trial court."

This case clearly is not Sinclair. This is an individual who was shown to be a person who will not be indigent in the future. This case is unlike Sinclair, there is a "realistic possibility" on the record before the court that Appellant will be able to pay costs in the future. *Id* at 393 Accordingly, this court should at this time decline to deny the State costs if the State is the prevailing party on appeal. RAP 14.2.

IV. CONCLUSION

The facts set forth by the state clearly supported the enhancement. The evidence was unrefuted that the delivery took place within 1000 feet of a school bus route stop. The State was not required to prove that the was a "bus" that stopped at that location,

The record is sufficient for this court to determine that Appellant may have the future ability to pay appellate costs therefore it is premature to deny this cost at this time.

For the reasons set forth above this court should deny this appeal.

/

/

Respectfully submitted this 20th day of September 2016,

By: s/ David B. Trefry

DAVID B. TREFRY WSBA# 16050

Senior Deputy Prosecuting Attorney

P.O. Box 4846 Spokane, WA 99220

Telephone: 1-509-534-3505

Fax: 1-509-534-3505

E-mail: David.Trefry@co.yakima.wa.us

DECLARATION OF SERVICE

I, David B. Trefry, state that on September 20, 2016, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Mrs. Susan Gasch at gaschlaw@msn.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of September, 2016 at Spokane, Washington.

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
Fax: (509) 534-3505
David.Trefry@co.wa.yakima.us