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NO. 64001-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JULIAN TELLEZ,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL FOX

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Possession with intent to deliver drugs can be found as long as there is one additional factor suggesting sales in addition to the fact of mere possession. A narcotics surveillance police officer observed appellant Tellez engaging in what appeared to be multiple hand-to-hand drug transactions of crack cocaine and cash prior to his arrest, using the same bindle of drugs that was later found on his person. Viewed in the light most favorable to the state, was the evidence sufficient to allow any rational trier of fact to find that he possessed cocaine with intent to deliver?

2. Appellant Tellez possessed cocaine with intent to deliver within 1000 feet of an active school bus stop. The school bus stops in question were considered active all year long, regardless of the traditional school year, because of summer school and extended programs. Viewed in the light most favorable to the state, was the evidence sufficient to allow any rational trier of fact to find that he was within 1000 feet of an active school bus stop?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Julian Tellez by Second Amended Information with Violation of the Uniform Controlled Substances Act - Possession with Intent to Manufacture or Deliver Cocaine. CP 12. The State further alleged within that information that he had committed the offense within 1000 feet of a school bus route stop. CP 12. Following a jury trial, the jury found Tellez guilty of both the underlying offense and the school bus stop enhancement. CP 13, CP 14-15. The court imposed a standard range sentence of 60 months of confinement plus an additional 24 months based on the school bus zone enhancement, to run consecutively. CP 50-54, 2/27/09 RP 5.

2. SUBSTANTIVE FACTS.

On August 18, 2008, at around 9:00pm, Seattle Police Officer James Lee was doing narcotics surveillance from the rooftop of a building at 2nd Avenue and Bell Street in downtown Seattle. 1/13/09 RP 54. He had a good view below of Bell Street from First Avenue to Third Avenue. 1/13/09 RP 55. He was using

a 10-by-50 binocular, which magnifies objects 10 times such that an object 50 feet away would appear 5 feet away. 1/13/09 RP 56-57. He could see objects clearly through the viewfinder. 1/13/09 RP 57.

On the date in question, Officer Lee observed Julian Tellez standing mid-block between 2nd Avenue and 3rd Avenue on Bell Street. 1/13/09 RP 59. Officer Lee's observation point was 60-70 feet away from the spot where Tellez stood. 1/13/09 RP 101. At the time, Tellez was counting money in both of his hands. 1/13/09 RP 61. Two men approached Tellez and they all began talking, after which Tellez reached into his right jacket pocket and removed a bindle, or clear baggie, which appeared to be a cigarette packet wrapper. 1/13/09 RP 68-69. It was twisted shut, consistent based on Officer Lee's experience with one of the most common ways drug dealers carry their product. 1/13/09 RP 70. Tellez then unwrapped the bindle by untwisting it, picked up a small item and dropped it into one male's palm. 1/13/09 RP 71-72. At the time, Officer Lee had been a street-level narcotics enforcement officer of seven years, 1/13/09 RP 48-50, averaging 20-50 crack cocaine arrests per month. 1/13/09 RP 53. Based on that, he was aware of

what crack cocaine looked like. 1/13/09 RP 51-52. In addition, Officer Lee was also familiar with the type of language used and the manner in which narcotics and money were exchanged during a drug deal. 1/13/09 RP 72. He could see through his binoculars that the object Tellez dropped in the other male's hand appeared to be crack cocaine. 1/13/09 RP 72. After examining it, the other male appeared satisfied and asked Tellez for more, gesturing with his hand. 1/13/09 RP 73. Tellez reached into the same bindle with his left hand, grabbed what appeared to be three to four more rocks of crack cocaine, and handed it to the other male. 1/13/09 RP 73-74. At that point, the other male cupped his hand and clearly gave multiple bills of money to Tellez. 1/13/09 RP 74. In Officer Lee's experience, the behavior was consistent with drug dealing. 1/13/09 RP 75.

Tellez put the bindle back in his right jacket pocket and soon another person approached him. 1/13/09 RP 77-78. There was another transaction similar to the first, starting with brief conversation, then Tellez reaching into his right jacket pocket and removing the same bindle as before, unwrapping it, and exchanging the contents with the other male for money. 1/13/09

RP 78. Officer Lee saw that the product Tellez put in the other man's hand also appeared to be crack cocaine. 1/13/09 RP 79. The male walked away and Tellez then put the bindle back in his pocket, going back to counting his money. 1/13/09 RP 80. Officer Lee could see that there still appeared to be some crack cocaine left in the bindle. 1/13/09 RP 80. Tellez began walking eastbound on Bell Street towards Third Avenue, at which point Officer Lee was certain that he had seen enough drug transactions to call in for an arrest and called Seattle Police Officers Boggs and Harris to arrest Tellez, giving a physical description of the suspect. 1/13/09 RP 82. Officer Lee maintained continuous visual contact with Tellez until Officers Boggs and Harris contacted him on Third Avenue. 1/13/09 RP 83. Tellez ran briefly but was shortly apprehended at Third Avenue and Blanchard Street. 1/13/09 RP 85.

Officer Harris searched Tellez incident to arrest and found pieces of crack cocaine inside the plastic cigarette wrapper in Tellez's right coat pocket. 1/14/09 RP 14, 17. The substance was later tested and found to be cocaine. 1/13/09 RP 134. Officer Harris also found \$54 cash in Tellez's hand. 1/14/09 RP 14. There were multiple bills: a \$20 bill, a \$10 bill, four \$5 bills, and four \$1 bills. 1/14/09 RP 14.

Thomas Bishop, the transportation manager for Seattle Public Schools, located four Seattle public school bus stops in the vicinity of Third Avenue and Bell Street. 1/13/09 RP 108. He marked three such stops in court on a map: one at First and Bell Street, one at Second Avenue and Wall Street, and one at Third Avenue and Bell Street. 1/13/09 RP 111. The information regarding location of these three bus stops was obtained from the school archives on November 20, 2008. 1/13/09 RP 111. The school district's record for these stops was created during the 2007-2008 school year. 1/13/09 RP 108. The three bus stops at First and Bell Street, Second Avenue and Wall Street, and Third Avenue and Bell Street were considered active school bus stops by the school district. 1/13/09 RP 111. Further, Thomas Bishop explained that a school bus stop is considered active by the school district all year long regardless of the traditional school year because of extended schedules and the district's summer school programs. 1/13/09 RP 113. The beginning of school year is September 1st. 1/13/09 RP 113.

Using the spot on Bell Street between Second and Third Avenues where Officer Lee first observed Tellez engaging in drug

transactions as the center point, Michael Lynch, a licensed land surveyor with Seattle Public Utilities, calculated a circle with a radius of 1,000 feet with a scale and compass. 1/13/09 RP 118. The school bus stop at Third Avenue and Bell Street was 235 feet from Tellez's initial drug transaction spot. 1/13/09 RP 119.

C. ARGUMENT

1. SUFFICIENT EVIDENCE IN THE RECORD SUPPORTS TELLEZ'S CONVICTION FOR POSSESSION WITH INTENT TO DELIVER.

Tellez argues that there is not sufficient evidence in the record to sustain his conviction for Violation of the Uniform Controlled Substances Act - Intent to Manufacture or Deliver. Tellez bases his claim on the argument that the State did not present any evidence that he intended to sell the cocaine found on his person after arrest.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime

beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. Furthermore, in determining whether sufficient evidence was presented, reviewing courts need not be convinced of the appellant's guilt beyond a reasonable doubt, but only that a reasonable trier of fact *could* so find. State v. Gallagher, 112 Wn. App. 601, 613, 51 P.3d 100 (2002).

In cases of possession with intent to deliver, the State must prove that the defendant intended to deliver the controlled substance "presently or at some time in the future." State v. Davis, 79 Wn. App. 591, 594, 904 P.2d 306 (1995). "Because of the nature of the charge of possession with intent to deliver, evidence is usually circumstantial." Id. As such, "[c]onvictions for possession with intent to deliver are highly fact specific." Id.

Specific criminal intent may be inferred from circumstances as a matter of logical probability. State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). Furthermore, it is not necessary that circumstantial evidence exclude “every reasonable hypothesis consistent with the accused's innocence.... [I]t is only necessary that the trier of fact is convinced beyond a reasonable doubt that the defendant is guilty.” State v. Valencia, 148 Wn. App. 302, 315-16, 198 P.3d 1065 (2000) (citing State v. Isom, 18 Wn. App. 62, 66, 567 P.2d 246 (1977)).

Intent to deliver may be inferred when at least one additional factor in addition to the fact of mere possession exists. State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002); State v. Brown, 68 Wn.2d 480, 484, 843 P.2d 1098 (1993); State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994). That additional factor “must be suggestive of sale as opposed to mere possession.” Hagler, 74 Wn. App. at 236. “Certainly, an intent to deliver might be inferred from an exchange or possession of significant amounts of drugs or money.” State v. Darden, 79 Wn. App. 591, 594, 904 P. 2d 306 (1995). In fact, “the type of circumstantial evidence often found to raise the inference of an intent to deliver . . . [includes] the

observation of an exchange or possession of significant amounts of drugs or money.” State v. Cobelli, 56 Wn. App. 921, 924, 788 P. 2d 1081 (1989). In contrast, a case of mere possession presents only the fact of “naked possession” with no additional factors such as a substantial sum of money, individual packaging, or surveillance where “officers observed no actions suggestive of sales or delivery or even conversations that could be interpreted as constituting solicitation.” Brown, 68 Wn. App. at 484. Finally, a large amount of drugs is not required to find someone guilty of possession with intent to deliver, “only that some additional factor suggestive of sale is required for corroboration.” State v. Zucker, 112 Wn. App. 130, 136, 48 P.3d 344 (2002).

In Cobelli, the court found mere possession without the inference of intent to deliver because the police officers observing the alleged drug deal “could not see anything other than conversation [between the defendant and another]; no exchanges or other suspicious gestures were observed.” Id. At 922. In contrast, the court in State v. Thomas, 68 Wn. App. 268, 843 P. 2d 540 (1992), found sufficient evidence to support the inference of intent to deliver because prior to the arrest and discovery of drugs

on the defendant, the police officers also saw the defendant “engaging in activities that resembled drug transactions.” Thomas, 68 Wn. App. at 270. In Thomas, the officers observed the defendant reach into his pocket and remove a small white pill bottle, remove the cap and tap the contents in his hand, and exchange the contents with different people for some cash. Id. at 270-71. The court found that the officers’ testimony “indicated that [the defendant] appeared to be selling drugs in three separate incidents outside the restaurant before he was arrested” and “[t]hat evidence logically relates directly to the material issue of what [he] intended to do with the cocaine he possessed when he was arrested.” Id. at 273. Based on the defendant’s possession of cocaine and the officers’ testimony that he “engaged in activity consistent with drug sales prior to his arrest,” the court then found there was sufficient evidence that a rational finder of fact could conclude that the defendant possessed cocaine with intent to deliver. Id. at 276.

Here, as in Thomas, Officer Lee directly observed Tellez engage in activity consistent with drug sales prior to arrest. Specifically, Officer Lee saw Tellez perform three transactions with

two different people, pulling the same bindle out of his right front coat pocket each time and providing what appeared to be crack cocaine. For the first transaction, he pulled out the bindle, took out rocks of what appeared to be crack cocaine out of the plastic wrapper, and gave it to his buyer. The buyer asked for more and Tellez performed the same actions as before, then collected money from the buyer. The second buyer then approached and Tellez reached into the same pocket, removed the same bindle and gave the second buyer more rocks of what appeared to be crack cocaine. The buyer then gave Tellez money. Officer Lee noted that there still appeared to be some rocks of crack cocaine in the bindle. Upon arrest, officers recovered a bindle with crack cocaine from the same right coat pocket and later determined it was cocaine. The acts prior to Tellez's arrest were clearly suggestive of sale and paired with the fact of Tellez's possession of the crack cocaine still in the bindle, sufficient circumstantial evidence to raise the inference of intent to deliver in the factfinder's mind.

Therefore, there is sufficient evidence in the record such that a rational trier of fact, viewing the evidence and all reasonable inferences therefrom in a light most favorable to the State, could

find that each element of possession with intent to deliver had been proven beyond a reasonable doubt. Tellez's conviction should be affirmed.

2. SUFFICIENT EVIDENCE IN THE RECORD SUPPORTS THE SPECIAL VERDICT THAT TELLEZ COMMITTED THE UNDERLYING OFFENSE WHILE WITHIN 1000 FEET OF AN ACTIVE SCHOOL BUS ZONE.

Tellez next argues that there is not sufficient evidence in the record to sustain the special verdict that he had committed the underlying drug crime within 1000 feet of an active school bus stop.

Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the

persuasiveness of the evidence. Id. at 719. In determining whether sufficient evidence was presented, reviewing courts need not be convinced of the appellant's guilt beyond a reasonable doubt, but only that a reasonable trier of fact *could* so find. State v. Gallagher, 112 Wn. App. 601, 613, 51 P.3d 100 (2002). Furthermore, it is not necessary that circumstantial evidence exclude "every reasonable hypothesis consistent with the accused's innocence.... [I]t is only necessary that the trier of fact is convinced beyond a reasonable doubt that the defendant is guilty." State v. Valencia, 148 Wn. App. 302, 315-16, 198 P.3d 1065 (2000) (citing State v. Isom, 18 Wn. App. 62, 66, 567 P.2d 246 (1977)).

Here, Thomas Bishop, the transportation manager of Seattle Public Schools testified that the school district considers school bus stops active year round, not limited to an August-to-June calendar:

Q: Just one final question: Is a school bus stop considered active all year long regardless of the traditional school year?

A: Because schools are extended and we've got summer school programs, things like that, yes, they are considered active all year round.

1/13/09 RP 113.

Earlier, Bishop also testified that he had obtained information on the school bus stops in question from the archived file for the 2007-2008 school year. 1/13/09 RP 111. He also testified that he had looked up that information on November 20, 2008, and that at the time of his testimony on January 13, 2009, those bus zones were currently considered active:

Q: Is it your testimony that those locations are active school bus zones or active school bus stops?

A: That's correct.

1/13/09 RP 111. Therefore, it is clear that the bus stops in question were not only active year round, without regard to the traditional school year, but were also still considered active the year immediately after Tellez's crime.

Therefore, viewed in the light most favorable to the State, the jury's special verdict is supported by evidence legally sufficient for any reasonable trier of fact to find the defendant guilty beyond a reasonable doubt of possessing with intent to deliver within 1000 feet of an active school bus stop. Tellez's sentence enhancement must be affirmed.

D. CONCLUSION

For all the foregoing reasons, the appellant's conviction should be affirmed.

DATED this 28 day of September, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, attorney for the Appellant, of the Washington Appellate Project, at the following address: 1511 Third Avenue, Suite 701, Seattle, WA 98101 containing a copy of Brief of Respondent also sent to the Court of Appeals, in State v. Julian Tellez, Cause No. 64001-1-I, in the Court of Appeals for the State of Washington, Division I.

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



Janice Schwarz
Done in Kent, Washington

Date 9/28/09