

FILED
December 10, 2015
Court of Appeals
Division I
State of Washington NO. 73364-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN SCOTT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE HOLLIS R. HILL

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u>	8
EVIDENCE OF INTENT TO DELIVER IS SUFFICIENT WHEN THERE IS EVIDENCE OF POSSESSION PLUS FACTS SUGGESTIVE OF SALE.....	8
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Brown, 68 Wn. App. 480,
843 P.2d 1098 (1993)..... 8

State v. Camarillo, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 9, 12

State v. Drum, 168 Wn.2d 23,
225 P.3d 237 (2010)..... 8, 9, 12

State v. Hagler, 74 Wn. App. 232,
872 P.2d 85 (1994)..... 9

State v. Lane, 56 Wn. App. 286,
786 P.2d 277 (1989)..... 10

State v. Llamas-Villa, 67 Wn. App. 448,
836 P.2d 239 (1992)..... 10

State v. Mejia, 111 Wn.2d 892,
766 P.2d 454 (1989)..... 10

State v. Salinas, 119 Wn.2d 192,
829 P.2d 1068 (1992)..... 9

State v. Simpson, 22 Wn. App. 572,
590 P.2d 1276 (1979)..... 10

State v. Theroff, 25 Wn. App. 590,
608 P.2d 1254, affirmed,
95 Wn.2d 385, 622 P.2d 1240 (1980)..... 9

State v. Thomas 68 Wn. App. 268,
843 P.2d 540 (1992)..... 11

State v. Wentz, 149 Wn.2d 342,
68 P.3d 282 (2003)..... 8

Rules and Regulations

Washington State:

CrR 8.3..... 1

A. ISSUE PRESENTED

Evidence of intent to deliver a controlled substance is sufficient if the State proves possession and facts suggestive of sale. The officer saw the defendant engage in two hand-to-hand drug transactions and saw the defendant slough crack cocaine into a trash container prior to his arrest. Did the trial court properly conclude there was sufficient evidence to submit the case to the jury and deny the defendant's motion for a new trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State of Washington charged the defendant, Brian Scott, by way of information with one count of violation of the Uniform Controlled Substances Act – possession with intent to deliver cocaine.

Trial commenced before the Honorable Hollis Hill. 2/23/15 RP 1. After the State rested, Scott made a half-time motion, which was denied. 2/26/15 RP 65. The jury unanimously found Scott guilty as charged. CP 10. Scott timely filed a motion to arrest judgment, a motion to dismiss under CrR 8.3(b) and a motion for a

new trial. CP 31-221. Judge Hill denied the defendant's motions and sentenced Scott within the standard range. CP 230-38.

2. SUBSTANTIVE FACTS

At trial, Seattle Police Department Officer Wes Collier testified that during December of 2014 he was part of the Seattle Police Department West Precinct Anti-Crime Team. 2/26/15 RP 5. During anti-crime team training, officers learn to conduct surveillance and conduct street-level drug transaction investigations. Id. at 6. Officer Collier also completed undercover school training where officers learn how to blend in with the public and identify dozens of different street drugs. Id. He estimated that he had participated in over 114 narcotic investigations in the past twelve months. Id. at 7. Of those investigations, Officer Collier estimated that he was the undercover observation officer more than 60% of the time. Id. at 8.

On December 19, 2014, Officer Collier took part in a "see-pop" narcotics operation in the Pike/Pine corridor of downtown Seattle. Id. A "see-pop" operation refers to a narcotics operation where officers conduct surveillance of a drug transaction and then make an arrest. 2/24/15 RP 38-39. During a "see-pop" operation,

the undercover observation officer wears plain clothes and looks for drug activity. Id. at 39. The arrest team officers wear police uniforms and make arrests based on the information given to them by the observation officer. Id.

Officer Collier was aware that this area of Seattle is classified as a Stay Out of Drug Area due to its unusually high narcotics activity. 2/26/15 RP 8. During this operation, Officer Collier was the observation officer. Id. at 9. He was dressed in plainclothes with a concealed earpiece connected to a radio that allowed him to communicate to the arrest team officers. Id. at 9-10. As the observation officer, Officer Collier looked for hand-to-hand transactions that could possibly be related to narcotics. Id. at 10. He explained that these transactions occur when two possible strangers meet together briefly and their hands touch each other and something is transferred from one hand to the other and vice versa. Id. The two strangers then leave in separate directions. Id.

During this operation, Officer Collier observed Scott. Id. at 12. Officer Collier did not use binoculars or any other equipment to enhance his vision, so he needed to be very close to any suspected drug transaction. Id. Officer Collier remembered Scott because he had a very distinctive Seattle Seahawks tattoo visible on his neck.

Id. at 13. Officer Collier first observed Scott on the southwest corner of Second and Pine Street. Id.

Officer Collier initially noticed Scott because it appeared that people gravitated towards Scott. Id. at 15. Officer Collier recognized the people that gravitated towards Scott and was aware that they were addicted to crack cocaine due to his personal interactions with them. Id. Officer Collier also noticed Scott's short curly hair, that he was a light-skinned black male, wearing a dark jacket with the hood down, blue jeans and light sneakers. Id. at 16-17.

Officer Collier approached within arm's length of Scott while two of the known crack cocaine addicts contacted Scott one at a time. Id. at 17. Officer Collier wanted to be close so that he could actually see if crack cocaine pass hands. Id. If he did not see objects that appeared to be crack cocaine pass hands, he would not have called the arrest team. Id.

Officer Collier saw Scott engage in two separate suspected drug transactions with people that Officer Collier knew were addicted to crack cocaine. Id. at 18. Each transaction was similar to the hand-to-hand transactions that Officer Collier described earlier and each transaction took less than five seconds. Id. During each suspected drug transaction, Officer Collier saw Scott transfer loose

“rocks” of apparent crack cocaine from his right jacket pocket to the known crack cocaine addicts. Id. at 21-22. The amount of suspected crack cocaine transferred was consistent with a typical street level drug transaction. Id. at 23. Officer Collier saw the other people transfer an unknown amount of money to Scott. Id. at 22-23. After the transactions, the buyers and Scott separated with Officer Collier behind Scott. Id. at 18. During the transactions, Officer Collier could see Scott’s Seattle Seahawks neck tattoo. Id. at 19.

As Scott continued westbound, Officer Collier called the arrest team and provided them with a physical description of Scott. Id. He did not provide the arrest team with information about Scott’s tattoo because they might not be able to see a neck tattoo while driving into the area. Id. at 63. While maintaining constant visual of Scott, Officer Collier noticed the arrest team officers arrive in a subdued Seattle Police vehicle. Id. at 20. When Scott noticed the arrest team, Officer Collier saw Scott drop suspected crack cocaine into a trash container. Id. Specifically, Officer Collier saw Scott reach into his right jacket pocket, the same pocket he previously retrieved suspected crack cocaine, and put the baggie of suspected crack cocaine on the rim of the metal trash container. Id.

Officer Collier alerted the arrest team about the suspected crack cocaine in the trash container and saw the arrest team recover the suspected crack. Id. at 20. Officer Collier emphasized that maintaining visual contact was important to preserve evidence and to ensure that Scott's apprehension went smoothly. Id.

Seattle Police Department Detectives Terry Bailey and Jeffrey Sharp were the arrest team. 2/24/15 RP 40-44. Officer Collier provided them with a description of Scott via radio and requested they arrest Scott for suspected drug transactions. Id. Detectives Bailey and Sharp were dressed in full Seattle Police Department uniforms. Id. at 44-45. After Officer Collier's initial request to arrest Scott, Officer Collier gave updated information to Detectives Bailey and Sharp regarding Scott's location. Id. at 45. When Detectives Bailey and Sharp arrived near Scott's location, Detective Bailey saw Scott exiting Déjà Vu, which is located on First Avenue. Id. at 46. Scott matched the exact description provided by Officer Collier. Id. Scott began walking southbound and Detective Bailey followed him on foot. Id. at 46-47. Detective Bailey identified himself as a Seattle Police officer and Scott continued walking towards a trash container. Id. at 47. Detective Bailey saw Scott put something in between the trash container and the carrier

that holds the trash container. Id. Detective Bailey's view of the trash container was not obstructed. Id. at 47-48. During narcotics investigations, Detective Bailey routinely watches a suspect's hands to see if the suspect discards drugs or consumes the drugs prior to an arrest. Id. at 51. Additionally, Detective Bailey watches a suspect's hands to ensure the suspect does not possess any weapons. Id.

As Detective Bailey contacted Scott, Scott was within a few feet of the trash container where he placed the suspected crack cocaine. Id. at 52. Detective Bailey saw Detective Sharp retrieve that item and noted that it was a clear plastic baggie with a white substance inside. Id. at 53, 78. Based on his training and experience with narcotics, Detective Bailey believed the white substance was crack cocaine. After Scott was arrested, Detective Bailey searched him and recovered \$78, two cell phones, an identification card, iPod, four rings and an earring. Id. at 75-81.

Janice Wu, a forensic scientist at the Washington State Patrol Crime Laboratory tested the suspected crack cocaine recovered from the trash container and confirmed that the substance was, in fact, cocaine. Id. at 101-10.

C. **ARGUMENT**

**EVIDENCE OF INTENT TO DELIVER IS SUFFICIENT
WHEN THERE IS EVIDENCE OF POSSESSION PLUS
FACTS SUGGESTIVE OF SALE**

Scott claims that there was insufficient evidence of intent to deliver crack cocaine and that the trial court abused its discretion in denying him a new trial. He is mistaken. There is sufficient evidence of intent to deliver where the State provided evidence of possession plus an additional fact that suggests intent to deliver.

Possession of a controlled substance, without more is insufficient to prove intent to deliver. State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). However, when the State provides evidence of an additional factor, there is sufficient evidence of intent to deliver. See id.

The relevant question in reviewing the sufficiency of the evidence in a criminal case is "whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." State v. Drum, 168 Wn.2d 23, 34, 225 P.3d 237 (2010). In determining whether evidence is sufficient to sustain a conviction, an appellate court views the evidence in the light most favorable to the State. Id. (citing State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). Additionally, the appellate court must

interpret those inferences most strongly against the defendant. State v. Hagler, 74 Wn. App. 232, 234-35, 872 P.2d 85 (1994) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. Drum, 168 Wn.2d at 24 (citing Salinas, 119 Wn.2d at 201.

Further, the appellate court defers to the fact finder on issues of witness credibility. Id. (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). This inquiry does not require the appellate court to determine whether it believed the evidence at trial established guilt beyond a reasonable doubt.

Whether there is evidence legally sufficient to go to the jury is a question of law for the courts; but, when there is substantial evidence, and when that evidence is conflicting or is such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact.

Hagler, 74 Wn. App. at 235. (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, affirmed, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

The statutory elements of possession of a controlled substance with intent to deliver are: (1) unlawful possession; (2) with intent to deliver; (3) a controlled substance. See id. Intent to deliver a controlled substance may be inferred where the evidence shows both possession and facts suggestive of a sale. Id. at 236. See e.g., State v. Llamas-Villa, 67 Wn. App. 448, 836 P.2d 239 (1992) (possession of cocaine, heroin, and \$3,200, combined with an officer's observations of deals supported the inference of intent); State v. Mejia, 111 Wn.2d 892, 766 P.2d 454 (1989) (held that 1 ½ pounds of cocaine combined with an informant's tip and a controlled buy supported an inference of intent to deliver); State v. Lane, 56 Wn. App. 286, 297, 786 P.2d 277 (1989) (one ounce of cocaine, together with large amounts of cash and scales supported an intent to deliver, where the court specifically noted that cocaine is commonly sold by the ⅛ ounce); State v. Simpson, 22 Wn. App. 572, 590 P.2d 1276 (1979) (possession of cocaine, uncut heroin, lactose for cutting, and balloons for packaging supported an inference of intent to deliver).

Here, the State presented substantial evidence of possession plus two separate hand-to-hand transactions where known crack cocaine addicts gave money in exchange for

suspected rocks of crack cocaine. Officer Collier stood within arm's length of Scott while two known crack cocaine addicts contacted Scott. 2/26/15 RP 17. During each suspected drug transaction, Officer Collier saw Scott transfer loose rocks of suspected crack cocaine from his right jacket pocket to the known crack cocaine addicts. Id. at 21-22. The amount of suspected crack cocaine transferred was consistent with a typical street-level drug transaction. Id. at 23.

After the two transactions, Officer Collier kept Scott in sight. Id. at 20. When Scott noticed the arrest team, Officer Collier saw Scott discard suspected crack cocaine into a trash container. Id. Specifically, Officer Collier saw Scott reach into his right jacket pocket, the same pocket he previously retrieved suspected crack cocaine, and put the baggie of suspected crack cocaine on the rim of the metal trash container. Detective Sharp retrieved the baggie, which contained a white, rock-like substance consistent with what Officer Collier saw Scott giving to the known crack cocaine addicts. 2/24/15 RP 53, 78. Thus, Officer Collier's testimony is strong evidence of what Scott intended to do with the cocaine. See State v. Thomas 68 Wn. App. 268, 843 P.2d 540 (1992) (officer's testimony about witnessing the defendant make suspected drug

sales tended to make it more probable that the defendant intended to deliver the cocaine he possessed).

Scott argues that Officer Collier's testimony lacks credibility due to various answers he could not recall on cross-examination. The jury is the ultimate judge of the credibility of each witness and the appellate court must defer to the fact finder on such issues. See Drum, 168 Wn.2d at 24 (citing State v. Camarillo, 115 Wn.2d 60, 71 794 P.2d 850 (1990)). Moreover, the questions that Officer Collier could not answer were tangential, at best, to the suspected narcotics transactions he witnessed.

Lastly, Scott argues that because Officer Collier opined that small rocks of crack cocaine are worth about ten dollars each, Scott would have possessed two ten dollar bills in his pocket and not a twenty dollar bill. However, Officer Collier testified that he could not determine the exact amount of money exchanged in the transactions. 2/26/15 RP 22-23. This argument is predicated on drawing inferences against the State, which is contrary to the standard of review.

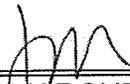
D. **CONCLUSION**

This Court should affirm the defendant's conviction and sentence.

DATED this 10th day of December, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Travis Stearns, the attorney for the appellant, at travis@washapp.org, containing a copy of the Brief of Respondent, in State v. Brian Allen Scott, Cause No. 73364-8, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 10 day of December, 2015.



Name:
Done in Kent, Washington