IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. VAUGHN ALLEN MILLER, Appellant.	No. 38859-6-II UNPUBLISHED OPINION

Hunt, J. – Vaughn Allen Miller appeals his jury trial convictions for tampering with physical evidence and possession of methamphetamine with intent to deliver. He challenges the sufficiency of the evidence. We affirm.

FACTS

I. Background

On October 24, 2008, members of the Southwest Washington Regional SWAT team executed a search warrant on a house and a detached shop/residential unit located at 5105 N.E. 137th Avenue in Clark County. SWAT team members knocked on the shop's entrance door, announced that they were "[p]olice with a search warrant," demanded entry, forced the door open, "deployed a noise flash diversionary device" that made a "loud boom" and emitted a flash of light in the door's threshold, and entered the shop area. II Report of Proceedings (RP) at 90. Clark County Sherriff's Office Detective Pete Muller and another SWAT team member then

opened a second door, located 15 yards across from the shop's the first door, and entered a smaller room.

They then knocked and announced their presence at a third door, which Muller believed led into Vaughn Allen Miller's room; opened the unsecured door; and entered a small bedroom. Miller and Shannon Riggins, both named in the search warrant, were in the bedroom. Miller was standing at "the top of" a dresser quickly "wiping things down and pouring liquids on top of objects on the top of the dresser." II RP at 93. When Muller ordered Riggins and Miller to the ground, Riggins complied but Miller did not. As Muller repeated his order two more times, Miller continued to pour liquid on the dresser and to wipe it down; he did not stop until Muller reached for his Taser.

Once the SWAT team had secured Miller and Riggins, Muller noticed a Pepsi can, an electronic scale, and a "lighted work station" on top of the dresser next to which Miller had been standing. II RP at 95. Miller had dumped the Pepsi all over the dresser and the lighted work station. Muller also noticed a "couple [of] monitors," which were attached to a security camera outside the shop building and which showed the driveway leading up to the shop but did not show the shop's door. II RP at 96.

After the SWAT team secured the shop building, officers searched the bedroom. Under a dark sticky liquid that appeared to be soda covering the top of the dresser, they found a small black digital scale and a white bottle cap containing what appeared to be soda and a trace amount of methamphetamine. They also found 0.1 gram of methamphetamine underneath an "overhang" in a corner of the dresser where there was no soda. II RP at 112; IV RP at 348. Next to the

dresser, the officers found a metal box containing two digital scales with methamphetamine residue, a plastic container with a trace amount of methamphetamine residue, a bent medical identification card issued to Miller on November 1, 2006, and small plastic baggies measuring about an inch and a half square. They also found three laptop computers, a metal can or container full of empty unused plastic baggies, and an envelope from the "Office of the County Clerk" addressed to Miller at that address. III RP at 257.

Clark County Sherriff's Office Detective Bill Sofianos talked to Miller in the main area of the shop and searched Miller and a safe to which Miller had the combination. Sofianos found $71 and some jewelry in the safe, and two $100 Visa gift cards and $190 cash in Miller's wallet. Sofianos found no drugs on Miller's person or in the safe; nor did he find any documentation indicating drug sale activity. Sofianos also interviewed Riggins, who told him that she and Miller lived in the shop's apartment and sold drugs out of the shop and that she believed the three laptop computers had been exchanged for drugs.

The SWAT team also executed the search warrant on the main house. The officers found several more people in the main house, including Darrell Burns, Odin Jones, Russell Coombs, and Neil Piland.

II. Procedure

The State charged Miller with (1) unlawful possession of methamphetamine with intent to deliver,[1] with a school bus route stop sentence enhancement[2] (count I); and (2) tampering with

[1] RCW 69.50.401(1), (2)(b).

[2] RCW 9.94A.533(6); RCW 69.50.435(1)(c).

physical evidence[3] (count II).[4] The State also charged Burns[5] with unlawful possession of methamphetamine[6] and unlawful use of drug paraphernalia.[7] Miller and Burns were tried together before a jury.[8]

Detective Sofianos testified that (1) he frequently saw surveillance systems when serving warrants on premises where there had been drug activity; (2) these systems were intended to "give the suspect under investigation time to destroy whatever evidence they might have in the house," II RP at 147; and (3) Riggins had told him that she and Miller had sold methamphetamine from the shop and that the laptop computers had been exchanged for drugs.[9]

Clark/Skamania Drug Task Force Detective Jeffrey Brockus testified that drug dealers often have scales to use for weighing and packaging their product in front of the purchasers and that they often use small plastic bags, like the ones found during this search, in drug sales. Catherine Dunn of the Washington State Patrol Crime Laboratory testified that methamphetamine

[3] RCW 9A.72.150(1)(a).

[4] The State also charged Miller with bail jumping, but the trial court severed that charge, and it is not at issue in this appeal.

[5] The State also charged Riggins, Jones, Coombs, and Piland in the same information. It is not clear from the record what happened to these other defendants' charges.

[6] RCW 69.50.4013(1).

[7] RCW 69.50.412(1).

[8] Following a CrR 3.5 hearing, the trial court admitted Miller's statements to Sofianos. Miller does not challenge admission of these statements on appeal.

[9] Miller expressly waived objection to this testimony at trial. And he does not argue on appeal that its admission was error.

will dissolve in water so there was no reason it would not also dissolve in Pepsi.[10]

Riggins testified for Miller,[11] stating that (1) she and Miller had moved into the shop apartment in April or May 2008; (2) they had broken up and Miller had moved out of the apartment in August 2008; (3) she and Miller still had a sexual relationship in October 2008, but Miller did not spend the night with her in the apartment the night before the officers served the search warrant; (4) she had not told Sofianos that she and Miller sold drugs out of the shop and that the laptop computers had been exchanged for drugs; (5) the drugs and scales in the bedroom belonged to her and were for her personal use; and (6) she had installed the surveillance system because the bedroom had no windows and it was hard to hear someone knock on the shop door. Annette Sullivan testified that she had rented a room to Miller in August 2008 and that he had lived in that room until his arrest.

The jury found Miller guilty of tampering with physical evidence and possession of methamphetamine with intent to deliver within 1,000 feet of a school bus route stop.[12] He appeals.

ANALYSIS

Miller argues that the evidence was insufficient to support his convictions. We disagree.

To determine whether sufficient evidence supports a conviction, we view the evidence in

[10] After the State rested, Miller moved to dismiss the charges for lack of evidence. The trial court denied this motion.

[11] Miller's counsel affirmatively waived any objection to this testimony. Miller does not argue on appeal that this was error.

[12] Miller does not challenge the school bus stop sentence enhancement on appeal.

the light most favorable to the State and decide whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). We draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). We also treat direct and circumstantial evidence as equally reliable, and we "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

I. Tampering with Evidence

Miller argues that because the State failed to test the soda on the dresser, there was no evidence that he destroyed or altered any evidence. This argument fails.

To convict Miller of tampering with physical evidence, the jury had to find beyond a reasonable doubt that, "having reason to believe that an official proceeding was about to be instituted acted without legal right or authority," Miller "destroyed or altered physical evidence with intent to impair its appearance, character, or availability in such prospective official proceedings." Clerk's Papers (CP) at 26 (Instruction 17); *see also* RCW 9A.72.150(1)(a). The evidence established that (1) when Detective Muller entered the bedroom, he observed Miller pouring liquid over the top of the dresser and wiping up the liquid; (2) even after Muller instructed him to stop, Miller had continued pouring the liquid over the dresser and wiping the surface; (3) after Miller stopped pouring the liquid over the dresser, there was still some methamphetamine present in a bottle cap that also contained a brown liquid; (4) the officers found

0.1 grams of methamphetamine in a protected area on the dresser that Miller's poured liquid had not reached; and (5) methamphetamine is soluble in soda pop.

Taking these facts in the light most favorable to the State, as we must, a jury could conclude beyond a reasonable doubt that (1) Muller witnessed Miller destroying or altering illegal drug evidence; (2) at the very least, Miller had used the soda to dissolve some of the methamphetamine in the bottle cap; and (3) the presence of methamphetamine on and around dresser, combined with Miller's actions and his failure to stop pouring soda when ordered, was circumstantial evidence that there had been more methamphetamine on the dresser before Miller began pouring soda on it. We hold, therefore, that the evidence was sufficient to support the jury's verdict.[13]

II. Possession with Intent to Deliver

Miller next contends that the evidence was insufficient to establish possession of methamphetamine with intent to deliver. To convict Miller, the jury had to find beyond a reasonable doubt that he (1) had actual or constructive possession of methamphetamine, and (2) possessed the methamphetamine with intent to deliver. RCW 69.50.401(1), (2)(b). Miller argues that the evidence was insufficient to show that he possessed the drugs or intended to deliver the drugs. Again, we disagree.

A. Constructive Possession

The trial court instructed the jury:

[13] That the State could have presented stronger evidence had it tested the soda on the dresser to determine if it contained methamphetamine does not mean that there was insufficient evidence to support the jury's verdict.

> Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

CP at 21 (Instruction 12).

Muller witnessed Miller's actual exercise of control as Miller attempted to destroy the drugs by pouring Pepsi on them.[14] Thus, regardless of whether the evidence established that Miller had actual possession of the methamphetamine or dominion and control over the premises, Miller's close physical proximity to and his exercise of dominion and control over the methamphetamine was sufficient to establish at least his constructive possession.

B. Intent to Deliver

Miller next argues that the evidence was insufficient to establish intent to deliver the methamphetamine because (1) the officers found a relatively small amount of methamphetamine;

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[14] Miller argues that under *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990), and *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969), his mere presence and an attempt to wipe the substance off the light table was not sufficient to establish possession. We disagree.

In *Spruell*, Division One of our court held that the evidence was insufficient to establish dominion and control over the drugs when defendant Luther Hill was merely present in the kitchen where the officers found the drugs and his fingerprint was on a broken plate that had apparently contained cocaine immediately before the officers entered the kitchen. 57 Wn. App. at 388-89. But none of these officers saw Hill in contact with the cocaine and there was no evidence establishing when he had left his fingerprint on the plate. *Spruell*, 57 Wn. App. at 388-89. Similarly, Callahan, who was a guest in the houseboat where officers found drugs, was near the drugs and admitted to having handled the drugs earlier that day; but there was no evidence that he had more than a mere passing contact with the drugs. *Callahan*, 77 Wn.2d at 28, 31. Here, in contrast, Muller witnessed Miller dumping soda over the dresser top where the methamphetamine was located. Miller's attempt to destroy the evidence was a clear exercise of control over the drugs that tied them directly to him. Accordingly, Miller's reliance on *Spruell* and *Callahan* is misplaced.

(2) the officers did not locate any paperwork, records, electronic files, or money that related to drug sales; and (3) the State did not establish that any of the scales were in working order.

But Miller ignores other evidence that proved his intent to deliver: (1) Riggins' admissions to Sofianos that the laptop computers had been exchanged for drugs and that she and Miller had sold methamphetamine from the shop; (2) the circumstantial evidence that there had been additional methamphetamine on the dresser before Miller poured Pepsi over it; and (3) the packaging materials, including the baggies, in the bedroom. These facts, taken in the light most favorable to the State, are sufficient to allow the jury to find intent to deliver methamphetamine. Accordingly, this argument also fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Hunt, J.

We concur:

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Bridgewater, J.

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Van Deren, C.J.