

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STEVEN ANTHONY DEMBROWICZ,

Appellant.

No. 39347-6-II

UNPUBLISHED OPINION

Sweeney, J. — The defendant here was convicted of possession of methamphetamine and use of drug paraphernalia. He claims the State failed to adequately show that the materials seized following his arrest were methamphetamine because police failed to hold back an untainted sample before testing, and the State also failed to adequately prove a chain of custody. Both assignments of error go to the weight the jury could have given this evidence and not its legal sufficiency, to support the elements of these crimes. In a related claim, the defendant assigns error to the judge’s refusal to give a “missing witness” instruction. This was not error because the State was not required to produce every witness involved in the chain of custody of the drug evidence. We therefore affirm the conviction and the sentence.

FACTS

Police Officer David Clary knew Steven Dembrowicz from earlier contacts with him. Officer Clary saw Mr. Dembrowicz walking in downtown Centralia, Washington. He ran a

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warrants check and discovered that Mr. Dembrowicz had an outstanding warrant. So Officer Clary arrested and searched him. He found methamphetamine and two hypodermic needles.

Officer Clary gave the drugs and paraphernalia to Officer Butcher; he had arrived to assist Officer Clary. Officer Butcher took the evidence to the Centralia Police Station, where Officer Clary photographed the drugs and needles. Officer Butcher tested the drugs and then put everything in a manila envelope and placed the envelope in an evidence locker. A police evidence technician removed the material and sent it to the Washington State Patrol Crime Lab for testing. Sharon Herbelin is a forensic scientist with the Washington State Patrol Crime Lab. She received the envelope from the Centralia police. It was intact and showed no evidence of tampering. The material tested positive as methamphetamine.

The State then charged Mr. Dembrowicz with possession of a controlled substance, methamphetamine, and unlawful use of drug paraphernalia.

The case proceeded to a jury trial. The State offered and the court admitted the lab report confirming that the material seized was methamphetamine. Officers Clary and Butcher and Ms. Herbelin testified. Mr. Dembrowicz noted that other witnesses in the chain had access to Mr. Dembrowicz's drugs but the State elected not to call them. And he asked the court to give a missing witness instruction (jury can draw inferences from the State's failure to call a witness). The court refused to give the instruction.

The jury found Mr. Dembrowicz guilty of possession of a controlled substance and unlawful use of drug paraphernalia and the court sentenced him. The State requested that the trial court add one point to Mr. Dembrowicz's offender score because he was on community custody

when he committed these crimes. Mr. Dembrowicz responded that the trial court should have required the State to prove that he was on community custody. The sentencing judge disagreed but apparently did not add the extra point, anyway. The extra point would have resulted in an offender score of 4, instead of 3. But the standard range, 6 to 18 months, would have remained the same whether Mr. Dembrowicz had an offender score of 3 or 4. The court sentenced Mr. Dembrowicz to a year and a day based on an offender score of 3.

DISCUSSION

SUFFICIENCY OF THE EVIDENCE

Mr. Dembrowicz first contends that the evidence is not sufficient to prove that he possessed methamphetamine because Officer Butcher failed to save a portion of the drugs he tested and his testing procedure could have contaminated the sample submitted to the state patrol crime lab.

The question, as framed, is whether substantial evidence supports a jury finding that the material seized from Mr. Dembrowicz was methamphetamine. Application of the substantial evidence standard tests whether the State met its burden of production; that is whether the State produced sufficient evidence to support the elements of the crime at issue, if believed. *State v. Dolan*, 118 Wn. App. 323, 331, 73 P.3d 1011 (2003). Significantly, we do not pass on how persuasive that evidence is. *Id.* And Mr. Dembrowicz's challenge here implicates the State's burden of persuasion; that is the weight the jury should have given to the drug evidence, not the admissibility or sufficiency of that drug evidence. *State v. Roy*, 126 Wn. App. 124, 130, 107 P.3d 750 (2005).

The State had to prove that the material seized from Mr. Dembrowicz was an unlawful drug - methamphetamine. RCW 69.50.4013(1); RCW 69.50.206(d)(2).

There is no evidence here one way or the other that Officer Butcher saved a sample of the material ultimately tested. Whether that should have been done was certainly the proper subject of cross-examination and jury argument to suggest that the sample and therefore testing were not reliable. But the contention does not address the essential legal question before us, whether the evidence presented supports the jury's findings that this was methamphetamine.

There is no evidence that the failure to save a sample undermined the factual and scientific conclusion that the material tested was methamphetamine. And a reasonable inference from the evidence is that the crime lab tested the material Officer Clary seized from Mr. Dembrowicz. He placed the drugs in an envelope and sent them to the crime lab. Ms. Herbelin tested the substance that Officer Clary seized from Mr. Dembrowicz, and that substance tested positive for methamphetamine. She testified that no one appeared to have tampered with the envelope before it got to her lab.

Ultimately, the State was not required to rule out every hypothetical scenario on this chain of custody to prove its case. *State v. Gosby*, 85 Wn.2d 758, 765, 539 P.2d 680 (1975). Again, Mr. Dembrowicz was free to suggest alternate hypotheticals to the jury by way of cross-examination and argument. Substantial evidence supports the jury's finding based on the direct evidence and the reasonable inferences from that evidence.

MISSING WITNESS INSTRUCTION

Mr. Dembrowicz next assigns error to the judge's refusal to give his proposed missing

witness instruction. He argued, and argues here, that the State did not call everyone who handled the drug evidence at the police department and at the crime lab before Ms. Herbelin tested it. And he was therefore entitled to the inferences permitted by the instruction.

The missing witness doctrine permits a jury to infer that the testimony of a would-be witness would be unfavorable. *State v. Dixon*, 150 Wn. App. 46, 54-55, 207 P.3d 459 (2009). The State, obviously, must not have called the witness. *Id.* And the defendant must show that the witness would have properly been part of the case, that the testimony would naturally be in the State's interest to produce, and the witness is within the State's control. *Id.* Whether Mr. Dembrowicz was entitled to the instruction is a question of law that we review de novo. *State v. Clausing*, 147 Wn.2d 620, 626-627, 56 P.3d 550 (2002).

The State showed the chain of custody of these drugs. It was not required to call everyone who touched this evidence. *State v. Lui*, 153 Wn. App. 304, 318-319, 221 P.3d 948 (2009), *review granted*, 168 Wn.2d 1018 (2010); *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). The drug evidence simply had to be "satisfactorily identified and shown to be in substantially the same condition as when the crime was committed." *Roche*, 114 Wn. App. at 436. The State does not need to eliminate every possibility of potential contamination nor identify the object with absolute certainty. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). Here, the State identified the drugs and showed that they were in substantially the same condition as when the crime was committed.

Ms. Herbelin testified that when she received the evidence, the envelope was still sealed, and so it was improbable that someone tampered with it. Three witnesses who actually handled

the evidence identified it. Ms. Herbelin received the evidence in a sealed envelope and the evidence technicians did not have access to the substance itself. This is a sufficient showing of the chain of custody.

The State then made a reasonable showing, with the witnesses it called, that the evidence was not contaminated and was in substantially the same condition as when Mr. Dembrowicz possessed it. Mr. Dembrowicz has not shown that other witnesses would have properly been part of the case, that any other testimony would naturally be in the State's interest to produce, or that any potential witness was uniquely within the State's control. In fact, there was no showing here that any prospective witness would not have been subject to Mr. Dembrowicz's control through proper application by counsel to the court or the prosecutor.

EXCEPTIONAL SENTENCE

Finally, Mr. Dembrowicz argues that the trial court erred in giving him an exceptional sentence by adding a point to his offender score because he committed the instant offense while on community custody. He is mistaken. The sentencing court did not add a point to his offender score based on his community custody status.

We affirm the conviction and sentence.

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.

Sweeney, J.

We concur:

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Penoyar, C.J.

Worswick, J.