

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

JOSE CHAVEZ GABRIEL, AKA JOSE  
CHAVEZ-GABRIEL,

Appellant.

No. 37839-6

UNPUBLISHED OPINION

Houghton, P.J. — Jose Chavez Gabriel appeals his conviction for unlawful possession of a controlled substance, methamphetamine, with intent to deliver and conspiracy to commit unlawful possession of a controlled substance, methamphetamine, with intent to deliver, both with firearm and school bus route stop enhancements. He argues that the trial court erred in denying his motion to suppress and in admitting certain evidence and that insufficient evidence supports his conviction.<sup>1</sup> We affirm.

**FACTS**

On December 12, 2007, Vancouver Police Department Detective Josannah Hopkins obtained a warrant to search a Ridgefield residence on 50th Avenue NE. The corresponding affidavit stated that a confidential informant (CI) had advised Hopkins that within the prior 72 hours he/she recognized two to four or more ounces of methamphetamine in the residence.

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<sup>1</sup> Pro se, he also raises an insufficiency of the evidence claim. RAP 10.10.

On December 18, officers from the Southwest Washington Regional Special Weapons and Tactics (SWAT) Team and the Clark-Skamania Drug Task Force executed the warrant on the Ridgefield residence. An officer knocked and announced several times, in both Spanish and English. When there was no response, the officers breached the front door and several windows. Inside, the officers encountered a Mexican male named Noe Rosas sitting on a living room couch, but they found no one else inside.

During the search, the officers found several items, including garbage bags with containers of MSM (a substance used to increase methamphetamine's bulk), tinfoil with crystalline residue on it, money, a cell phone, baggies, scales, and marijuana. They also found a .25 caliber semiautomatic handgun and baggies containing methamphetamine in kitchen drawers. Several MSM canisters had Chavez Gabriel's fingerprints on them. The officers also found his Mexican identification card and his birth certificate on a bedroom floor.

That same day, Cowlitz-Wahkiakum County Drug Task Force officers executed a search warrant at a 25th Avenue apartment in Longview. They found several people inside, including Wendy Robinson, Chavez Gabriel, and another Hispanic male named Rodrigo Rodriguez. There, the officers recovered only a jacket belonging to Rodriguez that contained \$4,000 cash.

The State charged<sup>2</sup> Chavez Gabriel with unlawful possession of a controlled substance, methamphetamine, with intent to deliver, unlawful possession of a controlled substance, marijuana, with intent to deliver, both with firearm and school bus route stop enhancements, and

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<sup>2</sup> The State first charged then 17-year-old Chavez Gabriel in juvenile court with unlawful possession of methamphetamine with intent to deliver, unlawful possession of a firearm, and unlawful possession of more than 40 grams of marijuana. The juvenile court entered findings of fact declining jurisdiction over Chavez Gabriel and transferred the case for adult prosecution.

conspiracy to commit unlawful possession of a controlled substance, methamphetamine, with intent to deliver.

Chavez Gabriel moved to suppress all evidence obtained through the search warrant executed on December 18, 2007. The trial court conducted a CrR 3.6 hearing, denied the motion, and entered findings of fact and conclusions of law. The State filed an amended information, altering the conspiracy charge date from December 19, 2007, to a period between October 1 and December 18, 2007.

The State called Paul Bardzik, the Battle Ground School District transportation director, to testify about school bus routes and stops. He testified that the district contracts with a transportation services company for its busing services. He stated that the district approves its bus stops and routes and described that process. When the State asked whether a school bus route stop existed at the 50th Avenue address, Chavez Gabriel objected to this testimony on hearsay grounds. The trial court first sustained the objection but allowed the State to lay a foundation, after which Chavez Gabriel objected again. The trial court allowed defense counsel to voir dire the witness outside the jury's presence. Bardzik consulted his school district records, and the trial court ultimately overruled the hearsay objection and allowed the testimony based on the school district records.

Before the case went to the jury, Chavez Gabriel moved to dismiss all charges for insufficient evidence. The trial court granted the motion as to the marijuana charge, but it denied the motion as to the methamphetamine and conspiracy charges. The jury found him guilty on all remaining charges, including special findings for school bus route stop and firearm enhancements.

Chavez Gabriel moved the trial court for an arrest of judgment for insufficient proof. He also moved for an arrest of judgment and for an order striking the school bus route stop enhancement finding, arguing that the evidence supporting it comprised inadmissible hearsay. The trial court denied the motions. He appeals.

## ANALYSIS

### Motion to Suppress

Chavez Gabriel first contends that the trial court erred when it denied his motion to suppress the evidence found at the Ridgefield residence. He raises two issues here; we discuss each below.

Chavez Gabriel initially asserts that the search warrant affidavit failed to establish probable cause to believe that the methamphetamine the CI claimed he/she saw would still be in the house when the police executed the search warrant.<sup>3</sup>

An affidavit establishes probable cause where it sets forth facts leading to a reasonable, commonsense determination that there is a probability that the defendant is involved in criminal activity and that evidence of the activity can be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). We review a magistrate's probable cause determination for abuse of discretion. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002).

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<sup>3</sup> Chavez Gabriel also appears to raise staleness by way of this assertion. Under *State v. Maddox*, “[a] delay in executing the warrant may render the magistrate’s probable cause determination stale.” 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). We apply a commonsense test to determine the staleness of information in a search warrant affidavit by looking to the totality of the circumstances surrounding its issuance. *Maddox*, 152 Wn.2d at 506. The magistrate issued the search warrant only six days before the search. The record does not support a staleness argument here.

A magistrate abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). We give great deference to the magistrate's determination and resolve all doubts in favor of the warrant's propriety. *See State v. Coates*, 107 Wn.2d 882, 888, 735 P.2d 64 (1987).

The probable cause affidavit outlined several facts, including: (1) the CI saw what he/she believed to be 2 to 4 ounces of methamphetamine; (2) the officer stated this exceeds a personal use amount; and (3) the CI knew of numerous vehicles used to transport drugs by one of the home's inhabitants. The CI provided this information 72 hours before the magistrate signed the search warrant.

From this information, the magistrate could make a reasonable and commonsense inference that criminal activity had taken place at the residence and that there was a reasonable probability that Hopkins could still find evidence of criminal activity there. Thus, we hold that the magistrate did not abuse its discretion in finding probable cause to issue the search warrant and the trial court did not err in denying the motion to suppress on that basis.

Chavez Gabriel also asserts that the affidavit lacked a basis from which the magistrate could conclude that the CI had the capacity to properly identify methamphetamine. In Washington, where an informant's tip forms the basis for probable cause, the *Aguilar-Spinelli*<sup>4</sup> test applies.

Under *Aguilar-Spinelli*, an affidavit of probable cause to support a search warrant must

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<sup>4</sup> *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

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set forth facts establishing an informant's veracity and basis of knowledge. *State v. Mejia*, 111 Wn.2d 892, 896-97, 766 P.2d 454 (1989). The veracity prong requires the magistrate to determine whether the informant has truthfully related the facts; the knowledge prong requires the magistrate to determine whether the informant has personal knowledge of those facts. *Mejia*, 111 Wn.2d at 896-97.

Chavez Gabriel does not assign error to any findings of fact. As such, we consider them verities on appeal. *See State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003) (unchallenged findings are verities on appeal). Further, they sufficiently meet the *Aguilar-Spinelli* test in that they establish the CI's veracity and knowledge. Finding of fact 2 states in part, "Hopkins alleged that she had been contacted by a [CI], who advised Hopkins that the [CI] has personally observed a substance the [CI] recognized to be methamphetamine in the residence within the last 72 hours." Clerk's Papers (CP) at 54. Finding 3 provides in part,

The [CI] was described as able to recognize methamphetamine because of " 'his or her years of being involved in the drug culture.' " In addition, the [CI] previously performed a controlled buy for [a Cowlitz County detective]. During this controlled buy, the [CI] purchased, and correctly identified, a quantity of methamphetamine.

CP at 54. Finding 4 states in part,

The affidavit detailed the [CI's] past history with law enforcement, motive, and general criminal history. The [CI] was alleged to be working with law enforcement officers for financial gain. In addition to the controlled buy in Cowlitz County, the [CI] was alleged to have provided the Cowlitz-Wahkiakum Drug Task Force and [a detective] with information which led to the recovery of drugs through search warrants on at least two other occasions.

CP at 55. Chavez Gabriel's argument fails.

School Bus Route Stop Enhancement

Chavez Gabriel next contends that the evidence offered at trial to prove that the crimes occurred within 1,000 feet of a school bus route stop violated his confrontation rights under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). At trial, he objected to the evidence on hearsay grounds.<sup>5</sup>

We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). We review asserted confrontation clause violations de novo. *State v. Larry*, 108 Wn. App. 894, 901, 34 P.3d 241 (2001).

Contrary to Chavez Gabriel's assertion, *Crawford* specifically states that the confrontation clause does not preclude the admission of testimony based on business records. 541 U.S. at 56. The school district, by way of its transportation contractor, prepared the bus route and bus stop document in the regular course of business. Bardzik, as the school district's transportation director, was qualified to testify about the record because he knew its mode of preparation and ultimately possessed it. This is a valid business record under RCW 5.45.020.<sup>6</sup>

Because Bardzik's testimony falls under the business records exception to the hearsay rule, Chavez Gabriel's argument fails.

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<sup>5</sup> ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

<sup>6</sup> RCW 5.45.020 defines a "business record" as:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

## Sufficiency of the Evidence

### Convictions

Chavez Gabriel next contends that insufficient evidence<sup>7</sup> supports his convictions and sentence enhancements. Sufficient evidence supports a conviction if, viewed in the light most favorable to the State, it permits any rational fact finder to find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). We draw all reasonable inferences from the evidence in the State's favor. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). We defer to the fact finder on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

In order to prove Chavez Gabriel committed unlawful possession of a controlled substance, methamphetamine, with intent to deliver, the State had to show that (1) on or about December 18, 2007, he or an accomplice possessed that controlled substance and (2) he or an accomplice unlawfully possessed the substance with the intent to deliver. RCW 9A.08.020(3); RCW 69.50.401(1), (2)(b). To convict as either an accomplice or a principal, the jury need only be convinced that the crime was committed and that the defendant participated in it. *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004).

Unlawful possession of a controlled substance may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession means that the goods are in the personal custody of the person charged; whereas, constructive possession means that the

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<sup>7</sup> Pro se, Chavez Gabriel raises the same insufficiency of the evidence argument raised by counsel. We do not address that argument separately.

goods are not in actual, physical possession, but the person charged has dominion and control over them. *Staley*, 123 Wn.2d at 798. Bare possession does not sufficiently support a conviction with intent to deliver. *State v. Hutchins*, 73 Wn. App. 211, 216, 868 P.2d 196 (1994); *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). The presence of contraband, together with packaging and other materials such as baggies, scales, and cutting agents, sufficiently support a finding of intent to deliver. *State v. Taylor*, 74 Wn. App. 111, 123, 872 P.2d 53 (1994).

The State presented evidence linking Chavez Gabriel to this crime, including: (1) his fingerprints found on MSM containers at the Ridgefield residence; (2) his ID found on the premises; (3) methamphetamine; (4) baggies, scales, and other delivery materials; (5) drug paraphernalia, such as tinfoil with burn marks; (6) a firearm; and (7) significant sums of money. He essentially asks us to draw inferences and weigh evidence in his favor and not the State's, which we decline to do. The evidence introduced at trial sufficiently supports his conviction for unlawful possession with intent to deliver.

In order to prove Chavez Gabriel committed conspiracy to unlawfully possess a controlled substance, methamphetamine, with intent to deliver, the State had to prove that (1) between October 1 and December 18, 2007, he agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of unlawful possession of a controlled substance with intent to deliver, methamphetamine; (2) he made the agreement with the intent that such conduct be performed; and (3) any one of the persons involved in the agreement took a substantial step in furtherance of the agreement. RCW 9A.08.020(3); RCW 69.50.401(1),(2)(b); RCW 69.50.407.

The State also charged Robinson with conspiracy. The State presented testimony and evidence documenting her involvement, including her purchasing the MSM cutting agent from a local animal feed store on several occasions. Tests revealed Chavez Gabriel's fingerprints on MSM bottles uncovered at the Ridgefield residence. Another individual, Rosas, was at the Ridgefield residence when police executed a search warrant. Chavez Gabriel and Robinson were both at another home in Longview when police executed a search warrant there. When we consider this, together with other evidence discussed above, in the light most favorable to the State, the State sufficiently proved beyond a reasonable doubt that Chavez Gabriel committed conspiracy to unlawfully possess a controlled substance, methamphetamine, with intent to deliver.

#### Sentence Enhancements

With regard to the firearm enhancement, the State must prove that the accused or an accomplice had a firearm at the time he committed the crime. RCW 9.94A.825. The State presented testimony that the police found a handgun, along with drugs and other paraphernalia, during the search of the Ridgefield residence. Officer Hopkins testified that officers commonly find firearms when executing drug-related search warrants. This evidence, when viewed in the light most favorable to the State, sufficiently proves beyond a reasonable doubt that Chavez Gabriel or an accomplice was armed with a firearm.

As to the school bus route stop enhancement, the State had to prove that the underlying unlawful possession crime was committed within 1,000 feet of a school bus route stop designated by the school district. RCW 69.50.435(1)(c). The State presented testimony from the school district to show that there was in fact a bus stop within 1,000 feet of the Ridgefield residence,

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where they seized the methamphetamine. The State sufficiently proved beyond a reasonable doubt that crimes occurred within 1,000 feet of a school bus route stop.

Affirmed.

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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Houghton, P.J.

We concur:

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Bridgewater, J.

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Hunt, J.