IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. OSCAR SANCHEZ, AKA REYNALDO MEDINA, Appellant.	)	No. 66194-9-I DIVISION ONE UNPUBLISHED OPINION FILED: March 5, 2012

Grosse, J. — Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the elements of the crime beyond a reasonable doubt. Here, the evidence supporting Oscar Sanchez's convictions of delivery of a controlled substance and possession of a controlled substance with intent to deliver meets this test of sufficiency. Accordingly we affirm.

FACTS

During the evening of January 22, 2010, while working undercover buying street-level narcotics, Seattle Police Officer Raul Vaca noticed a hand-to-hand transaction occurring between a person later identified as appellant Oscar Sanchez and another person. When the transaction was complete, Officer Vaca crossed the street and asked Sanchez if he had any "piedra," which is a Spanish street term meaning crack cocaine. Sanchez told Officer Vaca that he did have piedra and asked him how much he wanted. Then Sanchez and the officer walked slowly down the sidewalk and stepped into a doorway. Sanchez opened

his hand and Officer Vaca saw a brown napkin. Inside the napkin was a clear plastic baggie containing pieces of crack cocaine. Sanchez handed the drugs to Officer Vaca, who gave Sanchez $50 of buy money in return. Officer Vaca gave a good buy signal to the other undercover officers on his team and walked away.

Seattle Police Officer Jason Diamond watched the transaction between Officer Vaca and Sanchez from across the street and reported the activities by radio to the arrest team. Officer Diamond saw Officer Vaca and Sanchez walk to a doorway, make a hand-to-hand exchange, and then walk away in opposite directions on First Avenue. When Officer Diamond saw Officer Vaca give the good buy signal, he radioed Sanchez's description and watched the arrest team arrive. Officer Diamond testified that the person who was placed under arrest was the same person he saw make the hand-to-hand exchange with Officer Vaca.

Seattle Police Sergeant Brian Kraus was in charge of the arrest team on the night Officer Vaca bought cocaine from Sanchez. Officer Kraus and his arrest team heard Officer Diamond describing the suspect and his location. When the arrest team heard that a good buy signal had been given, Officer Kraus and two other officers on the arrest team came out of a parking garage. Officer Kraus immediately spotted Sanchez based on the description given in the radio report.

Officer Kraus watched Sanchez walk down First Avenue, drop a dark object at the base of a tree, and continue walking. Officer Kraus walked to the

tree and saw that the dropped object was a brown napkin. Inside the napkin was a plastic baggie containing what Officer Kraus believed was crack cocaine. The pieces of cocaine in the baggie were similar in shape and size to the pieces of cocaine Officer Vaca bought from Sanchez. The cocaine in the baggie Officer Kraus recovered weighed 4.6 grams.

The arresting officers recovered $731 from Sanchez's person. Included in the money recovered from Sanchez was the money Officer Vaca used to buy the cocaine from him. The officers also recovered a wad of brown napkins of the same style and color as the napkin Officer Kraus found at the base of the tree.

After a jury trial, Sanchez was convicted of one count of delivery of a controlled substance (cocaine) and one count of possession of a controlled substance (cocaine) with intent to deliver.

ANALYSIS

Sufficiency of the Evidence

Sanchez argues that the evidence was insufficient to support his convictions on the two counts with which he was charged. The standard of review of a claim of sufficiency of the evidence is well settled:

> Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the elements of the crime beyond a reasonable doubt. A claim of insufficient evidence admits the truth of the evidence and all reasonable inferences that can be drawn from that evidence. Circumstantial evidence and direct evidence are equally reliable, and we must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.[1]

[1] State v. Killingsworth, No. 65456-0-I, 2012 WL 255856, at *2 (Wash. Ct. App. January 30, 2012) (internal citations omitted).

1. Delivery of a Controlled Substance

The Washington Uniform Controlled Substances Act provides, "[I]t is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."[2] Cocaine is a controlled substance.[3] "To find a person guilty of the unlawful delivery of a controlled substance, the trier of fact must find that the defendant (1) delivered a controlled substance and (2) knew that the substance delivered was a controlled substance."[4] "Deliver" means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.[5]

Sanchez argues that the evidence was insufficient to prove that he was the person who sold the cocaine to Officer Vaca. We disagree. Officer Vaca identified Sanchez during trial as the person from whom he bought the cocaine. Officer Diamond identified Sanchez as the person he saw from across the street engage in a hand-to-hand exchange with Officer Vaca. Officer Kraus identified Sanchez as the person the arrest team apprehended after receiving Officer Vaca's good buy signal. The prerecorded buy money was recovered from Sanchez when he was arrested.[6] The cocaine Officer Vaca purchased from Sanchez was wrapped in a brown napkin; the object Officer Kraus saw Sanchez drop at the base of a tree was a brown napkin; a wad of brown napkins was

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[2] RCW 69.50.401(1).
[3] RCW 69.50.206(4).
[4] State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).
[5] RCW 69.50.101(f).
[6] We defer to the trier of fact's determination as to the credibility, or lack thereof, of Sanchez's testimony that the money found on his person was money he was paid for work as a day laborer. See Killingsworth, 2012 WL 255856, at *2.

found on Sanchez's person when he was arrested. The cocaine in the brown napkin Sanchez was observed dropping at the base of a tree was in pieces of similar size and shape to the cocaine Officer Vaca purchased. The evidence, viewed in a light most favorable to the State, was sufficient to permit a rational trier of fact to find the elements of delivery of a controlled substance beyond a reasonable doubt.

2. Possession of a Controlled Substance with Intent to Deliver

With regard to the crime of possession of a controlled substance with intent to deliver, an inference of intent to deliver cannot be based solely on possession of a controlled substance.[7] There must be substantial corroborating evidence of intent to deliver in addition to the mere fact of possession of a controlled substance.[8] At least one additional factor is required, and that additional factor must be suggestive of sale as opposed to mere possession.[9] Such additional factors include, for example, packaging and processing materials such as baggies, scales, and cutting agents.[10] Another factor suggestive of sale is evidence that the defendant had conducted a number of drug sales prior to his arrest.[11] So too is evidence of possession of a large quantity of drugs, a scale and a large amount of cash.[12] The fact that the amount of the controlled substance is small does not invalidate a jury verdict of an intent to deliver if corroborating circumstances exist.[13]

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[7] State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993).
[8] Brown, 68 Wn. App. at 485.
[9] State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994).
[10] State v. Taylor, 74 Wn. App. 111, 123, 872 P.2d 53 (1994).
[11] State v. Thomas, 68 Wn. App. 268, 273, 843 P.2d 540 (1992).
[12] State v. Lane, 56 Wn. App. 286, 298, 786 P.2d 277 (1989).
[13] State v. Zunker, 112 Wn. App. 130, 137-38, 48 P.3d 344 (2002).

Sanchez argues that the evidence was insufficient to prove his intent to deliver because there was insufficient corroborating evidence suggestive of sale as opposed to mere possession. Again we disagree. Sanchez was observed dropping a package containing 4.6 grams of cocaine. A large amount of money was recovered from his person. Before the controlled buy, Officer Vaca saw Sanchez engage in a hand-to-hand transaction with another person. Other officers saw Sanchez engage in a hand-to-hand transaction with Officer Vaca. The evidence, viewed in a light most favorable to the State, was sufficient to permit a rational trier of fact to find the elements of possession of a controlled substance with intent to deliver beyond a reasonable doubt.

Prosecutorial Misconduct

In his Statement of Additional Grounds (SAG), Sanchez raises claims of prosecutorial misconduct. His arguments relate to his conviction of possession of a controlled substance with intent to deliver.

Prosecutorial misconduct is grounds for reversal if the prosecutor's conduct was both improper and prejudicial.[14] We evaluate a prosecutor's conduct by examining it in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions.[15] A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict.[16] Where, as here, the defendant does not timely object to the comment

[14] State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).
[15] Monday, 171 Wn.2d at 675.
[16] Monday, 171 Wn.2d at 675.

at issue, reversal is required only if the prosecutor's conduct is so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative jury instruction.[17]

The prosecutor's comments of which Sanchez complains were made during the following argument:

> Ladies and gentlemen, you have received your instructions. It's up to you to draw your own conclusions. You have heard the testimony. You've heard what Officer Vaca said. You've heard what the Defendant was found with. You have seen all this. Given all the factors surrounding how these drugs were recovered, the amount, the amount of cash, the fact that the delivery was made, it's pretty clear that he possessed them with intent to deliver.
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> Now, Count I, he's guilty; Count II, he is guilty. You saw today, this morning, you had one instruction read to you that may seem confusing, maybe isn't clear about if you find him not guilty of Count II, there's a lesser included. What this means is that if you don't believe he had the intent to distribute on Count II, but you still believe he possessed the drugs, the 4.6 grams, you can find him guilty of a lesser included. That's what the instruction tells you, basically.
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> But the first question is: Do you think he had the intention to deliver the rest of these 4.6 grams. And if you do, he is guilty of that, and he did have that intent, and he did sell the drugs to Officer Vaca. So he is guilty of Count I and Count II. Thank you.

During rebuttal closing argument, the prosecutor stated:

> The defense story doesn't add up. What happened here is very clear. The Defendant was part of mistaken identity, but he was the one who mistook the identity of the undercover officer for a regular street junkie, and that mistake resulted in his arrest and him being caught for dealing drugs. He dealt drugs to an undercover officer, and so he's guilty of Count I, and he had more drugs that he had the intent to deliver, and so he is guilty of Count II. Thank you.

Sanchez argues that by making these comments, the prosecutor was

[17] State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008), cert. denied, Warren v. Washington, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).

improperly expressing his personal opinion as to Sanchez's guilt. A prosecutor may not express an independent, personal opinion as to the defendant's guilt.[18] However, while it is improper for a prosecutor to express his or her personal opinion that the defendant is guilty, independent of the testimony in the case, the prosecutor may argue from the testimony that the accused is guilty, and that the testimony convinces him or her of that fact.[19] "In other words, there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case."[20]

> It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.[21]

The prosecutor's comments to which Sanchez objects, evaluated in the context of the entire trial, were not improper expressions of the prosecutor's personal opinion as to Sanchez's guilt. Rather, the comments were proper inferences from the evidence and proper arguments that Sanchez is guilty based on the evidence presented. Further, we note that the jury was instructed that statements of the lawyers are not evidence and that the jury must disregard any

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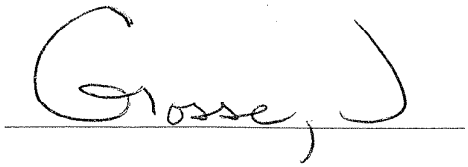
[18] State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).
[19] McKenzie, 157 Wn.2d at 53 (quoting State v. Armstrong, 37 Wash. 51, 54, 79 P. 490 (1905)).
[20] Armstrong, 37 Wash. at 54-55.
[21] McKenzie, 157 Wn.2d at 53-54 (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)) (emphasis omitted).

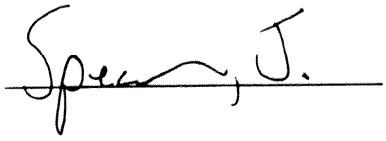
remark, statement, or argument that is not supported by the evidence or the law as stated in the court's instructions. We presume that the jury followed the court's instructions.[22]

Next, Sanchez argues that the prosecutor's comments had the effect of lessening the State's burden of proof at trial, confused the jury, and persuaded the jury to trust the State's judgment as to Sanchez's guilt on Count II, rather than its own view of the evidence presented. We disagree. The jury was instructed that the State had the burden of proving each element of the crimes with which Sanchez was charged beyond a reasonable doubt. Again, we presume that the jury followed this instruction. The prosecutor's comments did not lessen that burden or confuse the jury. The comments were proper arguments and inferences based on the evidence presented at trial.

Affirmed.



WE CONCUR:



[22] State v. Koss, 158 Wn. App. 8, 21, 241 P.3d 415 (2010).

Cox, J.