IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PINO JACOBO IBARRA, Appellant.	No. 38909-6-II UNPUBLISHED OPINION

Hunt, J. – Pino Jacobo Ibarra appeals his jury trial convictions and enhanced sentences for two counts of unlawful delivery of a controlled substance (cocaine) and one count of unlawful delivery of a controlled substance (marijuana), all with school-bus-route-stop sentencing enhancements. He argues that (1) the trial court violated CrR 6.5 and his federal[1] and state[2] rights to a jury trial when it failed to excuse or to discharge the alternate juror before sending the jury to deliberate, and (2) substantial evidence does not support the sentencing enhancements. Ibarra also raises several issues in a pro se Statement of Additional Grounds for Review (SAG).[3] We affirm.

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[1] U.S. Const. amend. VI.

[2] Wash. Const. art. I, § 7.

[3] RAP 10.10.

FACTS

I. Controlled Drug Buys and Search Warrants

After being arrested on drug charges, Jesus Santos Reyes agreed to work as a confidential informant for the Cowlitz-Wahkiakum Narcotics Task Force. The Task Force assigned Santos Reyes two targets, Pino Jacobo Ibarra (Ibarra) and his brother, Juan Carlos Jacobo Ibarra. Under the direction of Cowlitz County Deputy Jason Hammer, Santos Reyes engaged in three separate controlled-buy operations in which he purchased marijuana and cocaine from Ibarra. Each of these purchases took place in apartment 14 at 1262 12th Avenue in Longview.

Based on these controlled buys, Hammer obtained a search warrant for apartment 14 at 1262 12th Avenue; police executed the warrant on September 11, 2008. When officers knocked on apartment 14's door, a white male, whom Hammer did not know, answered. After talking to this man and to the apartment manager, Hammer obtained a search warrant for apartment 7 in the same building. While searching apartment 7, Hammer found Ibarra and Ibarra's brother's photo identifications and evidence that Ibarra had paid rent for apartment 14; but Hammer did not find any drugs or drug related materials.

II. Procedure

The State charged Ibarra with one count of unlawful delivery of marijuana and four counts of unlawful delivery of cocaine with school-bus-route-stop enhancements on all five charges.[4] The trial court set a January 12, 2009 trial date.

[4] The State also charged Ibarra's brother. The record does not show what happened to these charges, but it appears that Ibarra and his brother were not tried together.

On January 8, the State moved to continue the trial because Santos Reyes had left the country and the State was having problems transporting him back for the trial. The trial court granted the motion and reset the trial date to January 26. Ibarra's first trial ended in a mistrial after a juror revealed during the second day of trial that she knew Santos Reyes. The second trial started the next day.

During the second trial, Hammer testified that he had measured the distance from the northwest corner of the apartment building on 12th Avenue to the corner of 12th and Broadway, then from the corner of 12th and Broadway to the east side of the "Community House" entrance on Broadway, where he thought the school bus stop was located; this distance was 723 feet. 2 Report of Proceedings (RP) at 165. Hammer also testified that he had been mistaken about where the school bus stop was located and that it was actually located at the corner of 11th Avenue and Broadway, about one quarter of a block from where he had stopped measuring. While describing these distances, Hammer showed the jury what he had measured on an aerial map that was not admitted into evidence.

Immediately after closing arguments, the trial court sent the jury out to deliberate without first temporarily excusing or discharging the alternate juror. Neither party commented on the trial court's failure to excuse or to discharge the alternate juror at that time. First thing the next morning, the trial court stated:

> [T]hrough my own oversight, I let the alternate juror walk into the jury room when the—when we sent the jury originally back to deliberate. . . . My bailiff, Diane, caught that immediately. . . . And, we had the alternate juror step out before deliberations—well, before deliberations began.

3 RP at 259. Neither party objected to the trial court's characterization of its failure to excuse or

to discharge the alternate juror before sending the jury to deliberate or its assertion that the alternate juror had left the room before the jury started to deliberate, and neither party moved for a mistrial on this basis.

The jury found Ibarra guilty of one count of unlawful delivery of marijuana and two counts of unlawful delivery of cocaine; the jury also found that he had committed each offense within 1,000 feet of a school-bus-route stop. Ibarra appeals.

ANALYSIS

I. Failure to Excuse Alternate Juror

Relying on *State v. Cuzick*, 85 Wn.2d 146, 530 P.2d 288 (1975), Ibarra first argues that he is entitled to a new trial because the trial court did not temporarily excuse or discharge the alternate juror before sending the jury to deliberate. He contends that the record does not show how long the alternate juror was present during the jury's initial deliberations and that the alternate juror's presence is a non-waivable, per se prejudicial error. We disagree.

In *Cuzick*, at the State's request, the trial court allowed an alternate juror to be present during the jury's entire deliberations with instructions that the alternate juror not participate in the deliberations. *Cuzick*, 85 Wn.2d at 147. Our Supreme Court held that (1) the trial court did not have the authority to allow the alternate juror to be present during the jury's deliberations, (2) the trial court erred when it did not excuse the alternate juror as required under CrR 6.5, (3) the alternate juror's presence compromised the jury's ability to reach its verdict in private, (4) Cuzick could not waive his right to challenge the presence of the extra juror, and (5) this error was presumptively prejudicial. *Cuzick*, 85 Wn.2d at 148-49. But the court emphasized that we

presume prejudice only when there has been "a substantial intrusion of an unauthorized person into the jury room" that violates the rule that juries must deliberate in private. *Cuzick*, 85 Wn.2d at 150; *see also State v. Elmore*, 139 Wn.2d 250, 298-99, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837 (2000).

Here, in contrast, the record shows that the trial court characterized the alternate juror's presence as brief, noting that the bailiff resolved the problem "immediately" and that the alternate juror was removed *before* the jury started deliberating. 3 RP at 259. Thus, *Cuzick's* presumption of prejudice does not apply here. We further note that Ibarra registered no objection below to this procedure or to the trial court's characterization of the facts concerning the alternate juror's departure before deliberations began.

Ibarra now asserts for the first time, however, that the record does not support the trial court's characterization of the alternate juror's involvement and that we must therefore presume prejudice. We disagree. The presumption of prejudice is triggered only when the record clearly shows that an unauthorized person was present during the jury's deliberative process; *Cuzick* does not establish that we must presume that any presence of an unauthorized person is prejudicial. Moreover, the alternate juror was present throughout the entire jury deliberation in *Cuzick*. Here, in contrast, the alternate was removed immediately and did not participate in any jury deliberations.

Furthermore, Ibarra points to nothing in the record contradicting the trial court's characterization of the alternate juror's short pre-deliberation time in the jury room. Nor does he cite any authority requiring the trial court to hold a hearing to determine the circumstances in such

situations, which, we again note, neither party requested below. Because Ibarra has not shown that the alternate juror's unauthorized presence was anything other than a brief intrusion before the jury began to deliberate,[5] Ibarra is not entitled to relief on this ground.

II. Sufficient Evidence of School-Bus-Route-Stop Enhancements

Ibarra next argues that the evidence was insufficient to prove the school-bus-route-stop enhancements. Again, we disagree.

A. Standard of Review

Evidence is sufficient to support a conviction or sentencing enhancement if, viewed in the light most favorable to the State, the evidence presented at trial permits any rational trier of fact to find the essential elements of the crime or enhancement beyond a reasonable doubt. *State v. O'Neal*, 126 Wn. App. 395, 412, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007). We draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We consider circumstantial and direct evidence to be equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

We defer to the trier of fact, here the jury, on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). Additionally, it is the appellant's burden to perfect the record on appeal so that we

[5] To the extent there may be information outside the record demonstrating that the trial court's characterization was incorrect, we cannot address matters outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

have before us all of the information and evidence relevant to the issues raised. *See* RAP 9.2(b).

B. Sufficient Evidence

A school-bus-route-stop enhancement applies when a person sells or delivers drugs and the offense takes place "[w]ithin one thousand feet of a school bus route stop designated by the school district." RCW 69.50.435(1)(c). Ibarra first argues that Hammer never testified about the distance to the school-bus-route stop on Broadway because he stated that he turned from 12th Avenue onto Hemlock rather than onto Broadway. Although Hammer initially misspoke and said that he had measured the distance to a bus shelter on Hemlock, Hammer later corrected himself and clarified that he had measured to what he had believed was a school bus shelter on Broadway. Accordingly, Ibarra's argument fails.

Ibarra next argues that the evidence was insufficient to establish that the school-bus-route stop was less than 1,000 feet away from the location of the crimes because Hammer stopped measuring at the Community House entrance rather than at the actual bus stop on Broadway and 11th Avenue. Ibarra is correct that Hammer did not measure the distance from the end of his 723-foot measurement to the school-bus-route stop. But given Hammer's description of the route he did measure, a reasonable jury could have easily concluded that a straight line[6] between the crimes' location and the bus route stop was significantly shorter than the 723 feet Hammer measured. Thus, the evidence was sufficient to support the sentencing enhancements despite Hammer's not having measured approximately one quarter block to the actual bus route stop.

Additionally, Hammer referred to an aerial map of the area throughout his testimony, and

[6] *See State v. Wimbs*, 74 Wn. App. 511, 515, 874 P.2d 193 (1994) ("[M]easurement of the prohibited [school grounds] zone [is] the radius of a circle emanating from the location of the school grounds.").

a jury might have concluded that the remaining distance was insignificant based on this demonstrative exhibit. Ibarra has not, however, included in his designation of the record on appeal a copy of the map to which Hammer referred; thus, we cannot tell whether a reasonable jury could have concluded, based on the evidence presented, that the remaining distance was less than 277 feet.[7] Ibarra has the burden of providing us with an adequate record on appeal. RAP 9.2(b). Because he has failed to do so, he is not entitled to vacation of his sentencing enhancements on this ground.

III. SAG

A. Witness Credibility

In his pro se SAG, Ibarra appears to argue that Santos Reyes made various conflicting and unsubstantiated statements to the Task Force, which demonstrated that Santos Reyes was not credible. We do not review credibility issues on appeal. *See Camarillo*, 115 Wn.2d at 71; *Walton*, 64 Wn. App. at 415-16. Therefore, we do not further address this argument.

B. Continuance

Ibarra next contends that the trial court erred when it granted the State's request to reschedule the trial date because the State was having problems transporting Santos Reyes back to Washington State to testify at trial. We disagree.

We will not disturb a trial court's grant of a CrR 3.3 motion for a continuance or extension without a showing of a manifest abuse of discretion, which requires a showing that discretion was exercised on untenable grounds or for untenable reasons. *State v. Williams*, 104

[7] Ibarra does not argue that the evidence was insufficient on grounds that the State failed to present any measurements from the actual location of the drug sales.

Wn. App. 516, 520-21, 17 P.3d 648 (2001). Unavailability of a material State witness is a valid ground for continuing a criminal trial where the witness will become available within a reasonable time and the defendant suffers no resultant prejudice. *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936, *review denied*, 122 Wn.2d 1008 (1993). Santos Reyes was clearly a material witness. The record shows that the State was attempting to secure his presence as soon as possible. The resultant delay was relatively short. And Ibarra does not assert he suffered any prejudice. We hold, therefore, that the trial court did not abuse its discretion in continuing the trial date.

C. Ineffective Assistance of Counsel Claims

Finally, Ibarra argues that he received ineffective assistance when his trial counsel failed to challenge the search warrant for apartment 7 and failed to inform him (Ibarra) during his first trial about the option of proceeding with the remaining jurors, despite the fact that a juror personally knew Santos Reyes and, therefore, needed to be excused. Both of these claims require reference to matters outside the record on appeal; accordingly, we do not address them. *State v. McFarland*, 127 Wn.2d 322, 335, 338 n.5, 899 P.2d 1251 (1995) (a personal restraint petition is the appropriate method to obtain review of matters outside the record).

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.

Hunt, J.

We concur:

Bridgewater, J.

Van Deren, C.J.