

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 28242-2-III

Respondent,

Division Three

v.

BERNARD D. MILLYARD,

UNPUBLISHED OPINION

Petitioner.

Sweeney, J. — The defendant here was convicted of conspiracy to possess marijuana with intent to deliver and delivery of marijuana within 1,000 feet of school grounds. We conclude that the evidence was sufficient to support both convictions and affirm them. But the court’s instruction on the school zone enhancement special verdict can be read as requiring a unanimous verdict to answer no. The State agrees the instruction is incorrect, so we vacate the school zone enhancement. And we remand for further proceedings consistent with this opinion.

FACTS

Ray Cervantes made a controlled buy of marijuana from Donald Horn at Mr.

Horn's house in Davenport, Washington. He went to the house and told Mr. Horn he wanted to buy marijuana. Mr. Horn said he had just run out but would call a person from Harrington, Washington, who he grew marijuana with, and ask him to bring some. Mr. Horn called Barnard Millyard and told him to "bring him by a full zip"—an ounce of marijuana. Report of Proceedings at 42. An hour or so later, Mr. Millyard parked his Toyota pickup in front of Mr. Horn's house and went inside. Mr. Cervantes gave Mr. Horn marked money supplied by the police. Mr. Millyard handed Mr. Horn a work glove. Mr. Horn pulled a bag of marijuana from the glove and handed the bag to Mr. Cervantes. Mr. Horn then handed Mr. Millyard the marked money. Mr. Cervantes left a short time later and turned the marijuana over to police.

Police arrested Mr. Millyard. The State charged him with conspiracy to possess marijuana with intent to deliver and delivery of marijuana within 1,000 feet of the perimeter of a school grounds. A deputy sheriff measured the distance between Davenport High School and Mr. Horn's house. He measured 794 feet from the corner of the perimeter of the high school to the road in front of Mr. Horn's house.

A jury found Mr. Millyard guilty of both charges. It was then instructed to unanimously agree on whether Mr. Millyard did or did not deliver marijuana within 1,000 feet of a school grounds. The jury found that the delivery was within 1,000 feet of school

grounds.

DISCUSSION

Evidence Sufficient To Show Conspiracy

To prove conspiracy to deliver marijuana, the State had to prove that Mr. Millyard (1) agreed to deliver marijuana, (2) intended to do it, and (3) took a substantial step that furthered the agreement. Clerk's Papers at 78; RCW 69.50.401(1), .407; RCW 9A.28.040(1). The agreement required for a conspiracy is a genuine or bilateral agreement. *State v. Pacheco*, 125 Wn.2d 150, 155, 882 P.2d 183 (1994). Mr. Millyard contends that the State failed to show any agreement or substantial step.

We view the evidence in a light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* We then ask whether the State produced sufficient evidence to support the challenged elements of the crime. *State v. Henjum*, 136 Wn. App. 807, 810, 150 P.3d 1170 (2007). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). And "[j]udgment as to the credibility of witnesses and the weight of evidence is the exclusive function of the jury." *State v. Smith*, 31 Wn. App. 226, 228, 640 P.2d 25 (1982).

Mr. Horn called Mr. Millyard in Harrington and asked for an ounce of marijuana. Mr. Horn grows marijuana with Mr. Millyard. Mr. Millyard is from Harrington. And Mr. Millyard showed up at Mr. Horn's house with a bag of marijuana shortly after Mr. Horn called. The State produced substantial evidence that Mr. Millyard agreed to deliver marijuana. And the jury reasonably inferred from this evidence that Mr. Millyard agreed to deliver marijuana to Mr. Horn's house.

A substantial step is conduct that "strongly indicates a criminal purpose." *State v. Dent*, 67 Wn. App. 656, 660, 840 P.2d 202 (1992), *aff'd*, 123 Wn.2d 467, 869 P.2d 392 (1994). And Mr. Millyard not only drove to Mr. Horn's house with a bag of marijuana in his possession, but he also handed that bag to Mr. Horn, who handed the bag to Mr. Cervantes. These are substantial steps. We conclude that substantial evidence supports Mr. Millyard's conspiracy conviction.

Sufficient Evidence of Delivery in a School Zone

Mr. Millyard next contends that the State did not prove he delivered drugs within 1,000 feet of a school grounds because the measurement was not to the exact site of the delivery. The State concedes as much. Resp't's Br. at 14. We accept that concession. The ending point of a school zone measurement must be the actual site where the offense was committed. *State v. Clayton*, 84 Wn. App. 318, 321-22, 927 P.2d 258 (1996). The

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ending point here was not the site of the offense.

Unanimous Special Verdict

Mr. Millyard next argues that the court improperly instructed the jury that all 12 jurors had to agree to the special verdict, even if the answer was no. He is correct. *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010). But we need not address the issue since we vacate the school zone enhancement.

We affirm the convictions for conspiracy to possess marijuana with intent to deliver and delivery of marijuana but vacate the school zone enhancement and remand for further proceedings consistent with this opinion.

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

Sweeney, J.

WE CONCUR:

Kulik, C.J.

Siddoway, J.

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