IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63844-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
MICHAEL DUWAYNE SMITH,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: November 30, 2009
	)	

Lau, J. — Michael Smith appeals his conviction for delivery of methamphetamine in a school zone. He contends the trial court erred by refusing to instruct the jury on the "not for profit" affirmative defense to the school zone enhancement and in finding that he "used" a motor vehicle in the commission of the crime. Because no evidence exists in the record to support the affirmative defense and the trial court properly found a reasonable relationship between Smith's use of a motor vehicle and the delivery of the methamphetamine, we affirm Smith's conviction and sentence.

FACTS

On January 29, 2007, confidential informant Chastin Hoffman contacted Detective Jonathan Meador and agreed to buy methamphetamine from Michael Smith and Valentino Lucero. Hoffman later met with Meador and two other detectives to

arrange the transaction and set up surveillance. At that meeting, Meador searched Hoffman and the vehicle and then gave him $120 in prerecorded money to purchase the methamphetamine from Smith.

Hoffman then drove to an apartment building to meet with Smith and Lucero. Meador and the detectives followed Hoffman and parked their vehicles across the street where they could observe the apartment building. They watched as Hoffman walked into the apartment building. At the meeting, Smith and Lucero told Hoffman, "[T]hey had to go somewhere and pick [the methamphetamine] up for [Hoffman.]" Report of Proceedings (RP) (May 29, 2008) at 103. Hoffman gave the prerecorded money to Smith. Before leaving, Smith told Hoffman they would return in about 20 minutes. Smith and Lucero left the apartment building and drove to get the methamphetamine. When Smith and Lucero returned to the apartment building, they gave Hoffman the methamphetamine and Hoffman "loaded them a bowl" as a thank you. RP (May 29, 2008) at 104. Hoffman then left and rejoined Meador and the other detectives and gave them the methamphetamine he had just purchased from Smith and Lucero. Subsequent testing confirmed that the substance was methamphetamine.

The State charged Smith by amended information with delivery of methamphetamine in a school zone. At trial,[1] Smith requested the court to instruct the jury on the affirmative defense to the school zone enhancement based on RCW 69.50.435(4). This instruction required Smith to prove (among other elements) that the transaction was not for profit. Arguing the absence of evidence to show the transaction

[1] Smith and Lucero's cases were joined for jury trial.

was not for profit, the State objected to Smith's affirmative defense instruction. The court refused to give the instruction.

The jury convicted Smith of delivery of methamphetamine and returned a special verdict finding that the delivery occurred within a school zone. At sentencing, the trial court found that Smith used a motor vehicle in the delivery of the methamphetamine under RCW 46.20.285(4).

ANALYSIS

Affirmative Defense Instruction

Smith first argues that the trial court erred in refusing to instruct the jury on the statutory affirmative defense to the school zone enhancement contained in RCW 69.50.435(4). The State counters that the trial court did not err because there was no evidence in the record to establish this affirmative defense. Generally, a trial court must instruct the jury based on a party's theory of the case if the law and the evidence support it. State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). Failure to do so is reversible error. May, 100 Wn. App. at 482. A trial court's refusal to give an instruction based on an issue of fact is reviewed for an abuse of discretion. State v. Walker, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). However, a party is entitled to an instruction only when there is sufficient evidence to allow a reasonable juror to conclude that the defendant has established the defense by a preponderance of the evidence. See State v. Buford, 93 Wn. App. 149, 967 P.2d 548 (1998) (analyzing instruction for affirmative defense of unwitting possession). In determining sufficiency, a court interprets the evidence strongly in favor of the defendant. May, 100 Wn. App. at

482.

Here, Smith requested an instruction based on the affirmative defense to the school zone enhancement contained in RCW 69.50.435(4). His proposed instruction read,

> It is a defense to an allegation that the defendant sold or delivered a controlled substance within on[e] thousand feet of a school bus route stop designation by the school district that:
>
> (1) the prohibited conduct took place entirely within a private residence; and
>
> (2) no person under eighteen years of age was present in the private residence at any time during the commission of the offense; and
>
> (3) The defendant's conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance for profit.
>
> 4) This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that the defense is more probably true than not true. If you find that this defense has been established, it will be your duty to answer the special verdict "no."
>
> WPIC 50.60.01[2]

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[2] Smith erroneously credits WPIC 50.60.01 as the source for this instruction. This instruction, however, appears to be based on RCW 69.50.435(4) rather than the WPIC. But this discrepancy is not material to our resolution of this issue. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 50.60.01, at 988 (3d ed. 2008) (WPIC) provides,

"You will also be given a special verdict form [for the crime of ____] [for the crime[s] charged in count[s] ____]. If you find the defendant not guilty [of this crime] [of these crimes] [of ____], do not use the special verdict form. If you find the defendant guilty [of this crime][of these crimes][of ____], you will then use the special verdict form and fill in the blanks with the answer "yes" or "no" according to the decision you reach.

"The special verdict form for [this offense] [these offenses] has two questions. Because this is a criminal question, all twelve of you must agree in order to answer each question.

"The first question will ask you to consider the place where the crime occurred. For this question, the State has the burden of proof beyond a reasonable doubt. An earlier instruction defines this burden of proof.

"The second question will ask you to consider a defense raised by the defendant. For this question, the defendant has the burden of proof by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that the defense is more

Clerk's Papers at 136.

While the State acknowledges that sufficient evidence exists to establish the first two elements of this affirmative defense, it argues that Smith cannot establish the third element because he points to no evidence in the record that the transaction was not for profit. We agree. A party must first show sufficient evidence to support an instruction before the question can be posed to the jury. See State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). Here, Smith not only failed to make such a showing, but the uncontradicted[3] evidence demonstrates that the transaction was for profit—Hoffman testified that Smith gave him the methamphetamine in exchange for $120 and "a bowl."[4] RP (May 29, 2008) at 104. Given Smith's failure to show sufficient evidence that the transaction was not for profit and the uncontradicted evidence that it was for profit, the trial court did not abuse its discretion in refusing to instruct the jury on the affirmative defense.

Smith also contends for the first time on appeal that the trial court erred because, in refusing to instruct on this affirmative defense, it erroneously relied on WPIC 50.17 to define the "for profit" element.[5] But we will not consider issues raised for the first time on appeal, and we decline to do so here. State v. McFarland, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995); RAP 2.5(a).

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probably true than not true."

[3] Neither Smith nor Lucero testified at trial.

[4] "Bowl" in this context means a portion of the methamphetamine.

[5] WPIC 50.17 provides in relevant part, "For profit means the obtaining of anything of value in exchange for the controlled substance."

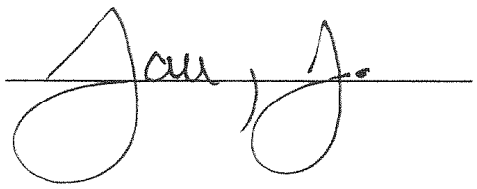
Use of the Motor Vehicle

Smith next argues that the trial court erred in finding that the offense was a "felony in the commission of which a motor vehicle is used" under RCW 46.20.285(4). That section allows the Department of Licensing to revoke a defendant's driver's license when a motor vehicle is used in the commission of a felony. RCW 46.20.285(4). The State counters that because there was a reasonable relation between Smith's use of the vehicle and the delivery of the methamphetamine, the trial court did not err.

In State v. Batten, 140 Wn.2d 362, 363–64, 997 P.2d 350 (2000), the court formulated the test for determining when a motor vehicle is "used" in commission of a felony. There, a police officer found a handgun under the driver's seat and a cotton ball and a spoon with methamphetamine residue in the center console. Batten, 140 Wn.2d at 363. The court reasoned, "'where the conviction is a possessory felony, we hold that the possession must have some reasonable relation to the operation of a motor vehicle or that the use of the motor vehicle must contribute in some reasonable degree to the commission of the felony.'" Batten, 140 Wn.2d at 365 (quoting State v. Batten, 95 Wn. App. 127, 131, 974 P.2d 879 (1999)). The court also concluded that "used" means "'employed in accomplishing something.'" Batten, 140 Wn.2d at 365 (quoting Batten, 95 Wn. App. at 129). The court then held that a sufficient relationship existed between Batten's commission of the felonies and the use of the car since he had used the car "to store and conceal the weapon" and as a "repository for the illegal substance." Batten, 140 Wn.2d at 366.

Relying on Batten, we held that RCW 46.20.258(4) applies where the commission of the felony directly involves the use of a motor vehicle. State v. B.E.K.,141 Wn. App. 742, 746, 172 P.3d 365 (2007); State v. Griffin, 126 Wn. App. 700, 708, 109 P.3d 870 (2005)). For example, in Griffin, we held that the defendant "used" a motor vehicle in commission of the felony of possession of cocaine where he obtained the cocaine in exchange for giving someone a ride because the use of the car directly contributed to the commission of that crime. Griffin, 126 Wn. App. at 708; see also State v. Dykstra, 127 Wn. App. 1, 11–12, 110 P.3d 758 (2005) (finding Batten test satisfied in first degree theft conviction where cars were stolen and used in look-out operations and to find other cars to steal).

Here, as in Batten and Griffin, Smith's use of the motor vehicle directly contributed to the commission of the crime of delivery of methamphetamine. Smith and Lucero accepted $120 from Hoffman to purchase methamphetamine. While Hoffman waited, Smith and Lucero drove to another location, obtained the methamphetamine, drove back to where they had left Hoffman, and then gave Hoffman the methamphetamine. The motor vehicle was thus directly "'employed in accomplishing something'"—the successful delivery of the methamphetamine to Hoffman. Batten, 140 Wn.2d at 365 (quoting Batten, 95 Wn. App. at 129). Because there was a reasonable relationship between Smith's use of the motor vehicle and the delivery of the methamphetamine, the trial court did not err in finding that Smith used a motor vehicle in the commission of a felony. We affirm Smith's conviction and sentence.



WE CONCUR:

Dwyer, A.C.J.

Schindler, C.J.